Office - Supreme Court, U. S.
FILED
OCT 15 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

HARTFORD-EMPIRE COMPANY, *et al.*,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

No. [redacted] 2

Appeals from the District Court of the United States for the Northern District of Ohio, Western Division.

BRIEF FOR HARTFORD-EMPIRE COMPANY AND THE INDIVIDUAL DEFENDANTS ASSOCIATED THEREWITH.

JOHN T. CAHILL,
Attorney for Hartford-Empire Company and the Individual Defendants Associated Therewith.

THURLOW M. GORDON,
STUART S. WALL,
JERROLD G. VAN CISE,
JAMES M. CARLISLE,
Of Counsel.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

INDEX.

	PAGE
INTRODUCTION	1
ARGUMENT	78
POINT I—The Acquisition by Hartford of Non-Competing Supplementary and Improvement Patent Rights Was Lawful	89
POINT II—The Acquisition by Hartford of Non-Competing Supplementary and Improvement Patent Rights Was Not Rendered Unlawful Because the Result, Foreseen and Intended, Was to Achieve Temporary Dominance	102
POINT III—The Exercise by Hartford of Its Patent Rights Through Limited Licenses Was Lawful	110
POINT IV—The Remedy Prescribed by the Court Below Is Confiscatory and Unsupported by Law	128
CONCLUSION	176
APPENDIX	179

TABLE OF HEADINGS.

	PAGE
INTRODUCTION	1
The Opinion Below	3
Jurisdiction on Appeal	3
Nature of Case	3
Statement of Case	8
The Background of the Industry	9
Early "hand" period	9
Appearance of "suction"	11
The "suction" period	11
Appearance of "gob feeding"	13
The "Gob Feeding" Period	15
Origin of Hartford	16
Patent conflicts	18
Decision to settle patent conflicts	22
The Patent Settlements	23
1916 Empire agreement	25
1917-1918 patent purchases	27
1922 Empire-Corning agreements	28
1924 Owens agreement	31
1922-1925 settlements	36
1932 Hazel-Atlas agreement	38
Miscellaneous minor feeder agreements	43
Forming machine settlements	44
Lehrs and stackers	49
Lehrs	49
Stackers	51

PAGE

Hartford's Exercise of Patent Rights 51

Awards of priority 51
Infringement suits 52
Lease-licensing policy 53
Royalties 54
Fields of ware 56
Exclusive licenses 57
Thatcher Milk Bottle Machine License 58
Ball Fruit Jar License 59

The Industry Today 61

Number of licensees 61
Business done by licensees 63
Competition between licensees 64
Effects of Hartford licensing 65
Hartford at the time of trial 67
Licenses at the time of trial 69

The Present Case 73

Events preceding suit 73
Nature of judgment 75

Specification of Errors 78

ARGUMENT 78

Importance of the case 78

Precedent established by the case 81

Discussion herein of the case 86

Denial of any conspiracy 87

POINT I. *The Acquisition by Hartford of Non-Competing Supplementary and Improvement Patent Rights Was Lawful* 89

The patents were not competing 89
The patents were valid 94

PAGE

The acquisition of non-competing valid patent rights was lawful 96
No acquisition of all patents occurred 100
Hartford properly settled with Owens 101
The judgment should be reversed 102

POINT II. *The Acquisition by Hartford of Non-Competing Supplementary and Improvement Patent Rights Was Not Rendered Unlawful Because the Result, Foreseen and Intended, Was to Achieve Temporary Dominance* 102

The intent of the parties was proper 102
Counsel were properly consulted 108
Ownership in one hand of non-competing patents 108

POINT III. *The Exercise by Hartford of Its Patent Rights Through Limited Licenses Was Lawful* 110

Limited licenses were issued 110
Limiting the number of licensees was lawful 112
Limiting the licensed use was lawful 115
A licensor may consult with licensees 119
A licensor may act on complaints by licensees 120
A licensor may indirectly affect competition 122
The limited license to Lynch was lawful 123
The general public interest is served by limited licenses 123
The limitations were discontinued before trial 125

POINT IV. *The Remedy Prescribed by the Court Below is Confiscatory and Unsupported by Law* 128

General Analysis of Judgment 129
The principal judgment provisions 129
The judgment defeats itself 133
No adequate hearing was held 133
The judgment should be reversed 135

PAGE

Initial Provisions 136
The initial injunction is hopelessly vague 136
The Hartford Receivership is unnecessary and unauthorized 138
Forfeiture Provisions 140
Forfeiture of contracts is ordered 140
Forfeiture of patents is ordered 141
Forfeiture of future patents is ordered 142
Forfeiture of machinery is ordered 144
Forfeiture of income is ordered 145
The Hazel-Atlas impounding order 148
Forfeiture of cash assets 148
The forfeiture provisions are not justified by B. B. Chemical and Morton Salt cases 149
The forfeiture provisions are opposed to public policy 155
Public Utility Provisions 158
Compulsory dealing with all is ordered 159
Rigid price uniformity is ordered 162
Miscellaneous Prohibitions 165
Leasing is prohibited 165
Limited and exclusive licensing is prohibited 166
Patent Office procedure is revised 167
Other provisions 171
Perpetual Surveillance 173
Conclusion 176
Appendix 179
Statutes Involved 179
Exhibits Involved 182

Table of Citations.

Cases	PAGE
Alexander Milburn v. *Union Carbide and Carbon Corporation*, 15 F. (2d) 678	98
American Lecithin Co. v. *Warfield Co.*, 105 F. (2d) 207	152
Andersen v. *Shipowners' Ass'n*, 31 F. (2d) 539	127
Apex Hosiery Co. v. *Leader*, 310 U. S. 469	155
Armstrong v. *DeForest Radio Tel. & Tel. Co.*, 279 Fed. 445	84
Aspinwall Manufacturing Co. v. *Gill*, 32 Fed. 697	117
B. B. Chemical Co. v. *Elmer A. Ellis*, 314 U. S. 495	149, 150
Becton, Dickinson & Co. v. *Eisele & Co.*, 86 F. (2d) 267	117
Bement v. *National Harrow Company*, 186 U. S. 70	96, 106, 114, 115, 118
Board of Trade v. *Christie Grain and Stock Company*, 198 U. S. 236	161
Cammeyer v. *Newton*, 94 U. S. 225	150
Chapman v. *Wintroath*, 252 U. S. 126	170
Cincinnati Siemens-Lungren Gas Illuminating Company v. *Western Siemens-Lungren Company*, 152 U. S. 200	117
Cinema Patents Co., Inc. v. *Columbia Pictures Corporation*, 62 F. (2d) 310	118
George Close Co. v. *Ideal Wrapping Mach. Co.*, 29 F. (2d) 533	118
Continental Paper Bag Company v. *Eastern Paper Bag Company*, 210 U. S. 405	113
Wm. Cramp & Sons Ship & Engine Bldg. Co. v. *International Curtis Machine Turbine Co.*, 246 U. S. 28	151
Crown Die & Tool Co. v. *Nye Tool & Machine Co.*, 261 U. S. 24	114
DeForest Tel. & Tel. Co. v. *Westinghouse Elec. & Mfg. Co.*, 13 F. (2d) 1014	84
DeForest v. *Meissner*, 298 Fed. 1006	84

PAGE

Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436 154
Fairmont Creamery Company v. *Minnesota*, 274 U. S. 1 163
Federal Trade Commission v. *American Tobacco Company*, 264 U. S. 298 176

General Talking Pictures Corp. v. *American Telephone & Telegraph Co.*, 18 F. Supp. 650 ..... 71, 127
General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175 and 305 U. S. 124 ..... 116, 117, 118, 123
Go-Bart Importing Co. v. *United States*, 282 U. S. 344 176
Good Humor Corporation of America v. *Popsicle Corporation of United States*, 59 F. (2d) 344 118
Goshen Rubber Works Co. v. *Single Tube Automobile & Bicycle Co.*, 166 Fed. 431 117
Grant v. *Raymond*, 6 Pet. 218 107
Great Atlantic & Pacific Tea Company v. *Cream of Wheat Company*, 227 Fed. 46 160

Hartford-Empire Co. v. *Swindell Bros.*, 96 F. (2d) 227 ..... 49, 50
Helvering v. *Griffiths*, 318 U. S. 371 157
Hobbie v. *Jennison*, 149 U. S. 355 117
Hollister v. *Benedict & Burnham Manufacturing Company*, 113 U. S. 59 151

Independent Wireless Telegraph Co. v. *Radio Corp. of America*, 269 U. S. 459 115
Indiana Manufacturing Co. v. *J. I. Case Threshing Machine Co.*, 154 Fed. 365 99
Innis, Speiden & Co. v. *Food Machinery Co.*, 2 F. R. D. 261 117
International Shoe Company v. *Federal Trade Commission*, 280 U. S. 291 98
International Visible Systems Corp. v. *Remington-Rand, Inc.*, 65 F. (2d) 540 121

James v. *Campbell*, 104 U. S. 356 151

PAGE

Langmuir, et al. v. *DeForest, et al.*, 18 F. (2d) 345 84
Libbey Glass Co. v. *McKee Glass Co.*, 216 Fed. 172 119

McClurg v. *Kingsland*, 1 How. 202 157
Milk Wagon Drivers Union v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287 135
Mitchell v. *Hawley*, 16 Wall. 544 117
Morton Salt Co. v. *The G. S. Suppiger Co.*, 314 U. S. 488 150

Novadel-Agene Corp. v. *Frederic H. Penn*, 119 F. (2d) 764 152

Owens Bottle Co. v. *Libbey Glass Co.*, 9 F. (2d) 564 117

Peoria Gas and Electric Company v. *Peoria*, 200 U. S. 48 153
Pope Manufacturing Co. v. *Owsley*, 27 Fed. 100 118

Radio Corp. v. *Radio Engineering Laboratories*, 1 F. Supp. 65 84
Radio-Craft Co. v. *Westinghouse Electric & Mfg. Co.*, 7 Fed. (2d) 432 119
Republic Steel Corp. v. *National Labor Relations Board*, 311 U. S. 7 173
Rex v. *Younger*, 5 T. R. 449, 101 Eng. Reprint 253 157
Rubber Company v. *Goodyear*, 9 Wall. 788 115, 118
Rubber Tire Wheel Co. v. *Milwaukee Rubber Works Co.*, 154 Fed. 358 96

Salt Producers Ass'n v. *Federal Trade Commission*, 134 F. (2d) 354 167
Seymour v. *Osborne*, 11 Wall. 516 150
Sinko Tool & Mfg. Co. v. *Casco Products Corporation*, 89 F. (2d) 916 118
Solomons v. *United States*, 137 U. S. 342 143, 151
Standard Oil Company v. *United States*, 283 U. S. 163 100, 119, 126
Standard Oil Company v. *United States* 221 U. S. 1, 78 129
St. Louis Street Flushing Machine Co. v. *Sanitary Street Flushing Machine Co.*, 178 Fed. 923 117

PAGE

Steiner Sales Company v. *Schwartz Sales Co.*, 98 F. (2d) 999 123
Swift v. *U. S.*, 196 U. S. 375 ..... 137, 163
Sylvania Industrial Corporation v. *Visking Corporation*, 132 F. (2d) 947 152
Thorn Wire Hedge Company v. *Washburn and Moen Manufacturing Company*, 159 U. S. 423 119
United Chromium, Inc. v. *General Motors Corp.*, 85 F. (2d) 577 52
United States v. *Aluminum Co. of America*, 44 F. Supp. 97 97
United States v. *American Bell Telephone Company*, 167 U. S. 224 ..... 79, 98, 105
United States v. *American Can Co.*, 234 Fed. 1019 .. 128
United States v. *Basic Products Co.*, 260 Fed. 472 .. 161
United States v. *Colgate & Company*, 250 U. S. 300 .. 165
United States v. *Cooper Corporation*, 312 U. S. 600 177
United States v. *Dubilier Condenser Corp.*, 289 U. S. 178 ..... 107, 170
United States v. *DeForest Radio Tel. & Tel. Co.*, 18 F. (2d) 338 84
United States v. *General Electric Company*, 272 U. S. 476 ..... 106, 114
United States v. *Great Lakes Towing Co.*, 217 Fed. 656 138
United States v. *Motion Picture Patents Co.*, 225 Fed. 800 99
United States v. *Standard Oil Co.*, 173 Fed. 177 ..... 128, 166
United States v. *United Shoe Machinery Co.*, 222 Fed. 349, aff'd 247 U. S. 32 ..... 43, 66, 97, 100 106, 109, 113, 166
United States v. *United States Steel Corp.*, 223 Fed. 55, aff'd 251 U. S. 417 128
United States v. *Univis Lens Co., Inc.*, 316 U. S. 241 154
United States v. *Winslow*, 195 Fed. 578, 227 U. S. 202 98
United States Consolidated Seeded Raisin Co. v. *Griffin & Skelley Co.*, 126 Fed. 364 ..... 119, 120

PAGE

Universal Sewer Pipe Corp. v. *General Const. Co.*, 42 F. Supp. 132 153

Virtue v. *Creamery Package Company*, 227 U. S. 8 ..... 96, 114, 121, 122

Vulcan Mfg. Co. v. *Maytag Co.*, 73 F. (2d) 136 ..... 113, 118

Walling v. *Shenandoah-Dives Mining Co.*, 134 F. (2d) 395 127

Waterbury Buckle Co. v. *G. E. Prentice Mfg. Co.*, 294 Fed. 930 100

Westinghouse Electric & Mfg. Co. v. *DeForest Radio T. & T. Co.*, 21 F. (2d) 918 84

Westinghouse Electric & Mfg. Co. v. *Tri-City Radio Electric Supply Co.*, 23 F. (2d) 628 119

Williams v. *Standard Oil Co.*, 278 U. S. 235 163

Laws

Clayton Act, Sections 3, 15, and 19, 15 U. S. C. §§14 and 25, 28 U. S. C. §383 ..... 1, 123, 137, 180

Expediting Act of February 11, 1903 3

Emergency Price Control Act, 50 U. S. C. App. §905 172

Judicial Code, §238 3

Miller-Tydings Act, 15 U. S. C. §1 172

Patent Law, 35 U. S. C. §§40 and 47 ..... 104, 117

Public Acts 286, 287, 288, 341, 358 75

Robinson-Patman Act, 15 U. S. C. §13 163

Sherman Act, Sections 1, 2, and 4, 15 U. S. C. §§1, 2 and 4 ..... 1, 128, 179

Small Business Mobilization Act, 50 U. S. C. App. §1112 172

United States Constitution, Article I 104

Webb-Pomerene Act, 15 U. S. C. §62 172

Other Citations

PAGE

Arnold, Address before Trade & Commerce Bar Association, 1938 156

Department of Justice Release, Dec. 11, 1939, C. C. H. Trade Reg. Serv., Par. 17,035 75

District Court Rule 4 135

Federal Rules of Civil Procedure, §65(d) 137

Final Report and Recommendations of TNEC, March 31, 1941, Sen. Doc. 35 of the 77th Cong., 1st Sess. 74, 126

Jackson and Dumbauld, Monopolies and the Courts (1938) 86 U. Pa. L. Rev. 231 156

Message to Congress by President Roosevelt, April 29, 1938 153

Patent Bills Introduced in Congress 125, 158

Preliminary Report of TNEC, July 17, 1939, Sen. Doc. No. 95 of the 76th Cong., 1st Sess. 74, 75

Report of the National Patent Planning Commission, June 18, 1943, House Doc. No. 239 of the 78th Cong., 1st Sess. 8, 76, 125, 167

Wigmore on Evidence, §2588 95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

HARTFORD-EMPIRE COMPANY, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee.*

No. 7.

Appeals from the District Court of the United States for the Northern District of Ohio, Western Division.

BRIEF FOR HARTFORD-EMPIRE COMPANY AND THE INDIVIDUAL DEFENDANTS ASSOCIATED THEREWITH.

Introduction.

This is a proceeding in equity brought by the Government, under the anti-trust laws, to prevent alleged violations of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act.*

The complaint herein charges, generally, an unlawful combination by the defendants to restrain trade in and monopolize (1) patents covering certain kinds of glassmaking machinery; (2) the manufacture and distribution of such machinery; and (3) the manufacture and sale of certain glass products (R. I, 1 *et seq.* Note particularly R. I, 12).

The glassmaking machinery described in the complaint is machinery adapted for the manufacture of glass con-

* The pertinent provisions of these statutes are set forth in the Appendix to this brief at pages 179-181.

tainers, and the glass products involved are primarily—although not exclusively—glass containers. The suit does not embrace flat glass, fiberglas, structural glass or glass blocks (R. X, 7654).

The principal defendant named in the complaint is the Hartford-Empire Company (R. I, 3), an engineering and research company serving the glass container industry. This Company develops, produces and distributes automatic machinery for the manufacture of glass containers (Stip., R. VII, 5325-6). The Hartford system of automatic machinery is conceded by the Government to be superior to any other in the world (Stip., R. VI, 4467).

Hartford-Empire Company's machines, and the methods used therewith, are patented. It leases and licenses its machines to more than 40 glass manufacturers upon a rental or royalty basis (R. II, 1274, 1481; Ex. H-5750, R. XXVII, 15436). It furnishes extensive engineering services to its licensees—through a staff of a hundred employees—not only in the maintenance of their equipment but also in securing maximum operating efficiency and in promoting the use of glassware. It maintains research laboratories in which more than a hundred additional employees are engaged continuously in research. Its personnel includes many engineers, chemists, physicists and other trained and skilled technicians and specialists (Stips., R. VII, 5326-7 and Ex. H-6152,* R. XII, 8593-4).

The other corporate defendants named in the complaint include certain of the larger Hartford licensees and the Glass Container Association (R. I, 3-6). The Hartford licensees are all glass manufacturers except for Lynch Corpo-

* For the convenience of the Court, a tabulation of the exhibits cited herein is set forth in the Appendix at pages 181-187, indicating (1) the number of each exhibit cited, (2) where offered in evidence, (3) where received in evidence, (4) where physically printed and (5) where referred to in this brief.

ration, which manufactures and distributes a kind of glass-making machinery known as forming machines (R. I, 5). The Glass Container Association is an incorporated association composed of manufacturers of glass containers and their suppliers (R. I, 6).

The individual defendants named herein are officers and directors of the corporate defendants (R. I, 6-9).

The Opinion Below.

An opinion of the District Court, generally sustaining the charges of the instant complaint, was entered herein on August 25, 1942 (Op. Vol., pp. 1-160).

This opinion is now reported at 46 F. Supp. 541.

A judgment of the District Court, following this opinion, was entered herein on October 8, 1942 (R. X, 7653 *et seq.*).

Jurisdiction on Appeal.

The Supreme Court noted, on March 1, 1943, probable jurisdiction to review this case (R. XXVIII, 16532).

The jurisdiction of this Court was invoked—under Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167), and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938)—by all the corporate and all but one of the individual defendants subject to the judgment below (R. X, 7708 *et seq.*).

Nature of Case.

This proceeding, now before this Court, is a test case of major importance.

It involves issues of the most far-reaching significance with respect to the application of the patent laws and the

anti-trust laws to our present stage of industrial development.

We have long since passed out of the early primitive stage where important advances in the machinery of production were the work of single men and were embodied in single inventions which might be covered by single patents. Almost invariably—under modern technological conditions—important advances are due not to the work of a single man or a single company but to the efforts of many men—each of whom makes important contributions which are useful only in conjunction with supplementary contributions made by others.

In such cases it often happens that patent deadlocks develop in which each of several different patent owners has a fragment of a machine, but unless these different contributions can be combined, they cannot be operated successfully, efficiently or with any degree of financial safety either to the patent owner or to the users of the machines in question.

Moreover, applications for patents are kept secret in the Patent Office until the patent actually issues or until an "interference" is declared between pending applications. Consequently, men who have made great expenditures of time and money in the development of some new improvement may be suddenly confronted either with a patent which they never heard of which blocks the efficient use of their inventions—or with interference proceedings in the Patent Office which may hold up the issuance of any patents whatever.

Unless settlements can be entered into by which these conflicting claims can in some manner be adjusted, the progress of the art may be indefinitely postponed.

The instant case presents for decision four basic issues, arising out of patent settlements and related transactions

claimed to have violated the anti-trust laws, which issues may roughly be summarized as follows:

1. *Patent settlements:* What can an inventor lawfully do when he has made a great and important contribution in a particular field but when the use by him of his invention is obstructed and frustrated by interminable interferences within the Patent Office—and by complex and dangerous litigation brought in the courts against himself and his licensees—by others who own or claim to own supplemental (not competing) inventions? Can he enter into settlement agreements with the owners of supplemental inventions?

2. *Motivating intent:* Can such an inventor settle these controversies by acquiring supplemental or improvement patents and patent rights—even though the effect, foreseen and intended, is to perfect a patented system of machinery which is better than anything theretofore existing, and thereby to achieve temporary "dominance"?

3. *Patent licenses:* May such an inventor, under his own or acquired inventions, lawfully grant limited licenses transferring to others not all but only part of his exclusive right?

4. *Punishment:* If such an inventor does overstep the patent laws or the anti-trust laws, in deciding the above questions, what happens to him?

   Should he become an outlaw?

   Should his property be confiscated?

   Should he be deprived of the right to do acts which are not unlawful *per se*—and be subjected to burdensome obligations not applicable to the public generally which will severely penalize and handicap him—not merely until any illegal restraints have been terminated—but in perpetuity?

With respect to the first three issues the Government contends, and the court below held, adversely to the right of patent owners to take the action outlined. The court held that the patent settlements and licenses of the defendants in this case constituted an illegal combination and conspiracy (Op. Vol., pp. 1-160).

With respect to the fourth issue the Government contends, and the court below held, that anti-trust violation by patent owners is punishable by confiscation. The court entered upon the suggestion of the Department of Justice a judgment of extraordinary and unprecedented character (R. X, 7653 *et seq.*). The revolutionary nature of this judgment is evidenced by citing only a few of its provisions, namely:

1. Hartford is turned over to a receiver who is to operate it—not merely pending the appeal—but for an indefinite period.
2. All agreements between the defendants or between Hartford and its licensees are cancelled.
3. All patents are confiscated by requiring irrevocable royalty-free licenses thereunder to any applicant.
4. All machinery owned and leased by Hartford is confiscated by requiring such machinery to be sold upon confiscatory terms.
5. The royalty income of Hartford—since September 1, 1942—is seized for return to the licensees.
6. Capital assets of Hartford are confiscated by the operation of Hartford—at a loss of over $100,000 per month—out of capital instead of income.
7. Future patents taken out by any defendant, individual or corporate, are subject to compulsory licensing at "reasonable" royalties to be fixed by the court—not merely pending the termination

of any restraints found to be illegal—but in perpetuity.

8. Future machinery distributed by any defendant, individual or corporate, is subject to compulsory sale at "reasonable" prices to be fixed by the court—leasing being prohibited—in perpetuity.

9. Drawings and patterns relating to machinery and methods of manufacturing must be supplied to all at "reasonable" rates to be fixed by the court—in perpetuity.

10. No defendant can grant an exclusive license or a license limited with respect to place, quantity, character of goods or similar limitations. This prohibition applies not only to patents on glass machinery but to patents on any machines, equipment or processes whatever.

11. The defendants are enjoined from doing many ordinary, proper and often necessary things in prosecuting patent applications and interferences and from settling interferences by negotiation.

12. These particular defendants—but not their competitors—are subjected to what is in substance a special Robinson-Patman Act compelling identical prices and terms to all customers—without, however, including the exceptions which make the Robinson-Patman Act workable and constitutional. These provisions apply not only to glass machinery but to any product or machine embodying a patent.

13. All defendants, individual as well as corporate, are prohibited from ever acquiring or holding, directly or indirectly, stock, bonds or assets of any other glassware or glass machinery company regardless of whether the acquisition could have any possible effect upon competition.

14. No defendant may make any agreement of any nature at any time with any other defendant without court approval—unless an identical agreement has previously been so approved.

15. The corporate defendants are subject to perpetual surveillance by the Department of Justice.

As the above partial recapitulation shows, the judgment puts into effect, without Congressional action, revolutionary legislative changes in the patent and anti-trust laws —many formulated by the Department of Justice and urged by it during the late T. N. E. C. investigation—which are directly contrary to the existing provisions of these laws as interpreted by this Court. Similar proposals for legislative change have repeatedly failed of acceptance by Congress, and have only this year been specifically disapproved by the Commission appointed by the President to study this subject, namely, the President's National Patent Planning Commission. (See House Doc. No. 239 of the 78th Cong., 1st Sess., page 9).

Statement of Case.

The following statement will explain the manner in which the patent and anti-trust issues, now presented for decision by this Court in the instant case, have arisen.

It is of course impossible to cover in a brief of reasonable length all details of the complex series of transactions set forth in the enormous record in this case, and accordingly such detailed coverage will not be here attempted. Indeed any such all-inclusive coverage would be unnecessary and irrelevant, in view of the fact that the stated object of this suit is to set a precedent—not merely for the glass container industry—but for industry in general. If

the Court desires a more detailed statement of the facts, such a statement, from these defendants' point of view, may be found in the proposed findings of fact submitted by Hartford below (R. IX, 7140 *et seq.*).

The Background of the Industry.

The glass container industry, which provides the general setting of this suit, is one of the many container industries.

As indicated by its name, the industry produces glass containers or packages adapted to hold such varied products as beer, milk, food, medicine, perfumes and miscellaneous liquid and dry products (Stip., Ex. 1568, R. XI, 8037-8). It vigorously competes with other container ware, such as tin, paper, wood and plastics (R. IX, 6770; R. VIII, 5845). Thus glass has always met strong competition from tin in supplying containers to the food packing industry (R. X, 7584-5). Even milk bottles compete with various forms of paper containers (Ex. H—5823, R. XXVII, 15475).

The glass container industry therefore has always been a highly competitive industry in the sense that—regardless of internal industry conditions—it has consistently reduced prices and improved quality in order to meet the onslaughts of other container ware.

In addition, there have always been many manufacturers competing with each other within the glass container industry itself (Stip., Ex. H—6152, R. XII, 8595; R. II, 1471-2; R. IV, 2554-6).

Early "hand" period.

The glass container industry, until as late as 1903, was handicapped in that it utilized exclusively crude hand-feeding and hand-blowing methods of manufacture, supple-

mented by certain semi-automatic processes (Ex. O—5945, R. XXVII, 15615-6). The industry, by reason of difficulties attendant upon the heating, cooling and molding of glass, had been unable to develop a fully automatic method of manufacture (*id.*). Without exaggeration it may be said that many of the industry's methods of manufacture remained essentially the same as those used during the time of Egypt's Pharaohs.

The ware produced by hand and lung power was of reasonably good appearance. The hand and lung method, however, was on the whole very unsatisfactory in that the product lacked uniformity of weight and capacity, was produced very slowly, and resulted in high production costs and prices (Ex. O-5945, R. XXVII, 15615-6; R. VI, 4286).

Moreover, because of the excessive heat and strain, it was exceedingly deleterious to the health of the workers (Ex. O-5945, R. XXVII, 15615-6).

The manufacturers during this early period consisted primarily of small hand shops (*id.;* see also R. VI, 4313). Each manufacturer tended to specialize in supplying a particular class of user with one or a few related types of glass container, as e.g. the brewery trade with beer bottles, the dairy trade with milk bottles, etc. (Exs. O-5946-7; R. XXVII, 15618, 15634; R. II, 1399-1400; R. VII, 5387-8, 5435-6; R. IX, 6389). This specialization was a natural one for many reasons. The customers were different and accordingly demanded different types of ware. Each article, size and shape required a different mold. Different articles required different kinds of glass—and separate melting furnaces—and special manufacturing techniques were required for each type (R. VI, 4314; R. IX, 6389).

This early stage of the industry's development is primarily of interest today in that it set a pattern, subsequently followed, of specialized manufacture—each manufacturer

tending to produce certain particular rather than all types of containers (R. II, 1399-1400; R. VII, 5387-8).

Appearance of "suction".

The first fully automatic machinery for the manufacture of glass containers was introduced in 1903 by the Owens Bottle Machine Company. This was the so-called "suction" machine and was covered by patents (R. IX, 6656-61).

This Owens invention utilized the principle of drawing molten glass up by a vacuum into a mold—the glass thereafter being shaped into the desired product (R. VI, 4308-9; R. VIII, 6264).

This revolutionary invention still is today an extremely efficient producer of containers. When operated at capacity, so that its initial cost and rather expensive upkeep can be pro-rated over numerous container units, its unit cost falls far below that of the old hand-feeding methods (R. III, 1553-4; Ex. O-5945, R. XXVII, 15615-7). The suction method enabled the licensed glass container manufacturers to increase their production and decrease their prices (*id.*)—thus improving the relative competitive position of the glass container industry.

The Owens machine did have certain serious faults. The machine itself was exceedingly large and cumbersome. It was extremely expensive, both in initial cost and upkeep. It lacked "flexibility" and could be operated economically only on long runs of standard sizes—rather than on short runs of different products (R. IX, 6603-5, 6562; R. VI, 4589, 4594). Therefore, only large manufacturers could profitably operate it (R. VI, 4593-5).

The "suction" period.

The Owens Company, when it first brought out its suction machine, was not itself a manufacturer of glassware.

(Ex. O-6014, R. XXVIII, 16135; R. VIII, 6283). Accordingly it began by distributing its patented machines to glass manufacturers under lease-license agreements. These licenses, very naturally, recognized the specializations theretofore pursued by the licensee manufacturers and authorized each licensee to continue the manufacture of his specific type or types of container, by means of the patented machine (R. IX, 6389, 6371-3, 6387-8*). Moreover Owens was careful not to destroy the value of its licenses by granting them indiscriminately (R. II, 1407; R. IX, 6389).

The impact of this licensing of the Owens patented machine to the industry was particularly felt by the small hand-process factories. These small manufacturers were unable profitably to use the suction machine themselves, and consequently were hard pressed by the competitive advantage of the larger manufacturers who did use the machine, with their low production costs and high and uniform quality of ware (Ex. H-5001, R. XXIV, 14675, 14685-6; R. II, 1399; R. III, 1553-4; R. VI, 4315).

In 1908, Owens, foreseeing that its patent control would eventually end, determined to become a glass manufacturer itself (Ex. O-6006, R. XXVIII, 16079-81; R. VIII, 6283). It thereafter rapidly expanded its manufacturing activities until in 1916 it became the largest glass producer in the industry (Ex. O-6014, R. XXVIII, 16132-4)—eventually in 1939 representing 34.97% of the total glass container industry production (Ex. GCA-6090, R. XXVIII, 16250).

At the same time Owens began to taper off its licensing activities. It never issued any additional licenses after 1918 (R. VIII, 6227; Finding 477, R. X, 7373). At the pres-

* See Owens licenses, Ex. O-5208, R. XVIII, 12328-30; Ex. O-5948, R. XIII, 9709; Ex. O-5995, R. XIII, 9721; Ex. O-5996, R. XIII, 9738; Ex. O-5997, R. XIII, 9755.

ent time Owens alone—because of the large volume of its business—still uses suction machines on the greater part of its production (R. IX, 6486). Other manufacturers, however, have discontinued the use of suction machines—although all patents thereon of any importance, both basic and improvement, have long since expired (R. IX, 6663). 86 of the 98 suction machines now operated by Owens are without the slightest patent protection (Ex. O-5958, R. XXVII, 16009; Ex. O-6183, R. XV, 11100; R. IX, 6656-9, 6664, 6482).

Appearance of "gob feeding".

A new and greatly superior automatic machine and method for the manufacture of glass containers, based upon an entirely different principle, subsequently made its appearance in 1914 and thereafter gradually superseded the Owens suction machine (R. I, 641; R. IX, 6603-5). This new machine was based upon a glass feeding principle which is technically and accurately described as "shaped suspended charge feeding", but which, for convenience, is hereinafter referred to as "gob feeding" (R. VI, 4693, 4666).

Prior to this new "gob feeding" machine other parties had experimented with and used a so-called "stream feeder" —which is not to be confused with "gob feeding"*—but the glassware produced thereby was of inferior quality (R. VI, 4317; R. II, 1399; R. IX, 6610-6611). The "gob feeding" machine was a new contribution to the art (R. II, 1406-7; R. III, 1932; R. V. 3817; R. IX, 6393-4; R. VII, 4742).

---

* During these early years "gob feeding" was sometimes loosely used to refer to any method by which a lump of glass is separated from a mass of glass. It was even applied to "stream feeding". In more recent years, however, and in this brief, this expression has been used as a short-hand expression to describe Hartford's "shaped suspended charge feeding".

This new machine was developed by the Hartford-Fairmont Company, predecessor of the defendant Hartford-Empire Company (R. VI, 4315-19, 4326, 4458; R. VII, 4741-2, 5323-4). Gob feeding—instead of sucking glass up into the molds—delivers it into the molds, not in a fluid state but in viscous pasty "gobs". Ingenious devices drop into molds a series of gobs of the desired weight and shape (a sphere, a cylinder, a cone, etc.) and of such proportions as are most suitable for the container to be manufactured (R. VI, 4529-34, note 4533; R. VII, 4741-2; Ex. H-5249, R. XIV, 10401).

In a gob feeding machine a pulsating discharge produces compact, hanging and suitably shaped masses from which while suspended, mold charges can be cut off by shears properly spaced below the discharge point. "Suspension" dispensed with intercepting cups or supports which would chill and "scar" the surface of the glass. The selected and controlled viscosity of "pasty" glass made suspension practical and useful, and permitted the shaping of the mold charges. Compactness eliminated overlapping and coiling of trickling glass streams—such as occurs if glass is poured directly into the molds by "stream feeders". Proper shear spacing permitted cutting of the suspended glass cleanly and quickly without "smearing". Compactness, with suspension, was necessary for the shaping of the mold charges to conform as nearly as possible to the shape of the mold, to prevent unequal chilling and "setting" and uneven distribution of the glass. The "shaping" processes were worked out through a so-called "phase change" invention, supplemented soon afterward by the shaping effects of plunger or air impulses in coordinated cycles (Ex. H-5342, R. XXV, 15032 C; R. VI, 4530-5, 4505-8).

As a result of continuous research and development, Hartford put out successively three forms of its gob

feeder—namely, the paddle feeder, the paddle-needle feeder and the single feeder, so-called, together with a constant series of improvements which have been made from time to time upon these successive general types (R. II, 812; R. VI, 4536-7, 4459-67). However, we shall not attempt to differentiate between these machines but shall refer to them simply as the Hartford feeder—because basically they were successive developments of the same fundamental feeder principles (R. VII, 4741-2; R. VIII, 6217-8).

The impact of this new machine upon the industry and upon the industry's competitors was even greater than that of the suction machine. The Hartford gob feeder, unlike the Owens suction machine, was relatively cheap in initial cost and upkeep (R. II, 1483-4; R. VI, 4604-5; R. VII, 4845-6; R. IV, 2560-1). It was adaptable both for long and for short runs of containers and for types of ware which the Owens machine could not produce (R. VI, 4590; R. IX, 6422-3, 6603-5). Consequently, the Hartford invention permitted the large and small manufacturer equally to benefit from efficient automatic machine production. It thereby increased competition within the industry (Stip., Ex. H-6152, R. XII, 8595) and enabled the glass industry to compete more effectively with other forms of containers.

In short, the gob feeder substantially superseded the expensive suction machine (which was driving the small container manufacturer out of business) with a better machine that permitted the small container manufacturer to survive. The revolution in the industry thus accomplished by Hartford is more fully set forth in the record.

The "Gob Feeding" Period.

The Hartford gob feeding system, like the Owens suction process, was patented.

The successive steps in the perfecting, patenting and licensing of this gob feeding process have given rise to the principal issues in this case.

Origin of Hartford.*

Hartford, the inventor of the gob feeding system, was formed in 1912 by a group of Hartford engineers, the Beech-Nut Packing Company and the Monongah Glass Company (R. VI, 4303; R. I, 637). It was organized as a research company, with a capital investment by 1915 of $120,000 (R. II, 1423), for the purpose of developing and exploiting certain inventions and ideas of the Hartford engineers with respect to automatic glass making machinery (R. VI, 4303-4). Beech-Nut was a food packer and Monongah supplied it with glass containers (R. VI, 4285-6). These two companies agreed to make a limited investment in the new company hoping that more efficient methods of producing glass containers—of high quality—could be developed (Ex. H-5001, R. XXIV, 14675, 14680; R. VI, 4303-4).

In 1912 and 1914 the company filed patent applications with respect to certain of its basic inventions on the gob feeding system—which applications were from time to time supplemented by numerous additional applications on improvement inventions thereafter developed (Ex. 5355, A and B, R. XVII, 11997; R. XVIII, 12027; Ex. H-5680, R. XVIII, 12028).

By 1913 Hartford, continuing the previous research of its engineers, had succeeded in developing a successful feeder, using the principle of "suspended charge feeding" (Ex. H-5342, R. XXV, 15032C; R. VI, 4319, 4625). Machines embodying Hartford's inventions, utilizing both

---

* "Hartford" is used in the same sense herein as it was in the court below, namely to refer both to Hartford-Fairmont Company (1912-1922) and to its successor Hartford-Empire Company (1922 to date).

plunger and paddle feeding devices, had been constructed and successfully operated (R. VI, 4625). Hartford, of course, realized that its feeder was capable of further improvement and in fact very great improvements have continuously been made (R. VI, 4459-67, 4588).

In 1914 Hartford disclosed its feeder to the industry and in 1915 began to offer licenses for the new machines under its patent applications and all resulting patents (R. II, 1405-6). It adopted from the very inception substantially the same system of licenses, and of leasing its machinery, that it continued to use for many years thereafter (R. II, 1406-7, 1409-11; see R. VI, 4332-5, 4340).

These licenses permitted each licensee to manufacture with the patented machine the type or types of glass container he had previously been manufacturing (Stip., Ex. H-6152, R. XII, 8571). The industry was accustomed to licenses of that sort and they seemed naturally suited to the needs of Hartford and its licensees (R. II, 1407).

We wish to emphasize strongly that this decision as to the form of licensing and leasing machinery, and as to the attendant rate of royalties, was arrived at independently by Hartford in the normal course of its business developments and independent of—indeed long before—any agreements or other contacts with Empire, Corning, Owens or any of the other defendants (R. II, 1406; R. VI, 4338). The licensing policies then adopted were continued substantially unchanged until 1940 (R. II, 1472).

The small glass manufacturers eagerly welcomed this new system of automatic machinery (R. II, 1402-3; R. III, 1553-4). They had been unable to use profitably the expensive Owens suction machines and accordingly were in something resembling a state of panic as to their own future (Ex. H-5001, R. XXIV, 14685-6; R. II, 1399; R. VI,

4315). Moreover even if they had desired to use the Owens suction machines they would have experienced increasingly greater difficulty in doing so, because, as previously stated, Owens was discontinuing its licensing business.

Patent conflicts.

Hartford, as subsequent events proved, was exceedingly rash in disclosing to the industry so valuable an invention as the gob feeder before the patents upon it had actually issued. No sooner had Hartford disclosed its gob feeder to the industry than it ran into one of the most involved and exasperating patent conflicts that our patent system has ever seen.

As is well known, such conflicts have frequently developed in other industries. The historic difficulties of Edison and his inventions—and of Westinghouse, Bell and others—are matters of common knowledge.

The conflict in the present case arose primarily out of the fact that the gob feeder, although a relatively small and adaptable machine, is most complex in its internal construction and methods of operation (Ex. H-5361, R. XXV, 15062). The different parts of the machine must perform a considerable number of independent functions, all of which are supplemental to each other, and must be accurately coordinated to produce the final result (R. VI, 4529-35). Its various component parts embody the contributions of many men and these contributions are of varying degrees of scope and importance (Ex. H-5915, R. XIV, 10901-2; R. VIII, 6217-8, 6123-8, 6159-60). Hartford believed that its engineers had developed the basic inventions (R. II, 815) and the courts subsequently so held (R. XI, 8023 *et seq.*). But there were other inventions which had to be combined with those of Hartford to make the machines workable and efficient (Ex. H-5915, R. XIV, 10902; R. VI,

4351, 4361-2, 4382-4). And for many years there was violent controversy with other claimants who, having seen the Hartford machines, claimed priority as to some of its elements.

Most of these patent controversies revolved about the ownership of (Exs. H-5008-5010, R. XXIV, 14702-14711, note 14705, 14710; Ex. H-5228, R. XV, 11168, 11170; Ex. H-5398, RXXV, 15095-15; R. II, 1413):

1. The fundamental or basic inventions on the suspended charge feeding method.

2. The inventions relating to the application of heat to the issuing glass and the outlet.

3. The "stuffing" method of shaping the charges while they remained suspended.

4. The over-all control of shaping the charges by the so-called phase change method.

5. The use, arrangement and adjustments of the plunger to control the weight and/or shape of the charges formed in suspension.

6. The rotation of the plunger and the feed bowl containing the molten glass, relative to each other, for the purpose of keeping the glass near the orifice homogeneous with the glass in the feed bowl.

7. Miscellaneous improvement features.

We have previously referred to the fact that under Patent Office procedure applications for patents are kept secret until the patents actually issue—or until "interferences" are declared between rival applications for the same patents.

Hartford soon found that although it had invented and constructed the first practical gob feeder, it had unwittingly used in certain of the elements of its feeder ideas claimed in certain patent applications and patents owned by others. In due course the Patent Office declared interferences be-

tween these other applications and the applications of Hartford (Stip. Ex. 973, R. XI, 8027 *et seq.*).

Moreover—and this was one of the most exasperating aspects of the situation—Hartford soon encountered a number of copyists—conscious or otherwise—who after seeing the new feeders which Hartford was seeking to put upon the market, constructed "competing" feeders incorporating Hartford's inventions. Typical of these concerns were the Howard Automatic Glass Feeder Company, Tucker, Reeves & Beatty (Federal) and Wm. J. Miller—all discussed more fully hereafter.

These concerns also filed numerous patent applications relating to various phases of the Hartford feeder, with certain fragmentary variations of their own (R. VIII, 6125-8, 6218). These applications were placed in interference with the applications of Hartford by the Patent Office (Stip., Ex. 973, R. XI, 8027 *et seq.;* Ex. H-5398, R. XXV, 15095-15). It was to the interest of these concerns to prevent as long as possible the issue of the Hartford patents and this they successfully proceeded to do (R. II, 1443-7; R. VII, 4941).

Finally—and this was also very serious—this small and struggling research organization immediately met with active strong opposition from the two largest manufacturers of glass containers in the industry—Owens and the Hazel-Atlas Glass Company (R. II, 869). These two companies were both vastly larger than Hartford—Owens alone having assets in 1916 of $18,000,000 (Ex. O-6014, R. XXVIII, 16137-8). Compared with them, Hartford, whose capital had all been dissipated in research and in litigation—was in a very weak position (Stip., Ex. H-5002, R. XII, 8506, 8513-4).

Owens brought four successive infringement suits against Hartford or its licensees; the first was under the

Brooke patent—which suit Hartford won (255 Fed. 901; affirmed 262 Fed. 427 (C. C. A. 2d)); the second was under an Owens forming machine patent (R. VI, 4355; R. II, 1442); and the third and fourth were under the Brookfield and the Lott patents, which suits were serious and were ultimately settled (R. VIII, 6041-2).

Applications for additional patents filed by Owens and Hazel-Atlas were also put in interference in the Patent Office with the applications filed by Hartford (Stip., Ex. 973, R. XI, 8027 *et seq.*).

The cumulative effect of opposition from all these sources was devastating. Hartford, although the creator of this enormous improvement in the art of container manufacture—an improvement which was to be the salvation of the smaller glass manufacturers—was for a long time deprived of the benefits of its inventions (R. II, 815).

The issue of the Hartford patents was blocked by no less than 60 contested interference proceedings between 1916 and 1925 (Ex. 973, R. XI, 8027-31). These interferences continued for many years and involved a large number of different parties and different inventions (Ex. H-5398, R. XXV, 15095-15).

In the meantime the Hartford feeder was being widely copied—and used without payment of royalties to Hartford (R. II, 815). The Hartford licensees were threatening to cancel their licenses in view of this royalty-free competition (R. II, 1422). Infringement suits threatened not only to enjoin the future use of the Hartford feeder but also to impose upon Hartford crushing liability for infringement damages arising out of the past use of that feeder by its licensees whom Hartford was obligated to defend (E.g. Ex. 1625, §16, R. XIII, 9394). Hartford was losing money so rapidly that by 1922 its accumulated losses had risen to $765,000—several times its original capital (R. II, 1423 and

1426). Its engineers had been taking part or all of their compensation in Hartford common stock of dubious value (Ex. H-5001, R. XXIV, 14675-8). That stock—needless to say—never paid a dividend in the first twelve years of its existence (Ex. H-5011, R. XXIV, 14711-2).

Hartford—unless this patent deadlock could be solved—was threatened with destruction (R. II, 1443, 1447; R. III, 1933).

Decision to settle patent conflicts.

The only course open to Hartford—if it desired to save its business—was to enter into settlement agreements to the end that

> (1) The patent interferences be dissolved and the patents to which Hartford was entitled be issued on its inventions, and
>
> (2) Hartford be enabled to perfect its machines and to distribute them with reasonable security to itself and to its licensees against attacks by the holders of blocking and improvement patents reading on various aspects of the Hartford machines.

The logic of the Government's position seems to be that Hartford should have settled with no one; that it should have fought every controversy with conflicting claimants to the bitter end clear to the Supreme Court—settling nothing, compromising nothing, conceding nothing.

The result would have been bankruptcy for Hartford. It would also have meant years of chaos in which no machine manufacturer could have lawfully or safely built the superior gob feeding machines—and no glass manufacturer could have lawfully or safely used them.

The principal parties who would have benefited from such a situation would have been Owens and Hazel-Atlas—the two largest glass manufacturers—both of which could

have used the Owens suction machines (Ex. O-5208, R. XVIII, 12328 *et seq.*) and thus would have continued to enjoy that advantage over the rest of the container industry.

The only realistic and practical thing for Hartford to do was to settle—and Hartford settled—dealing with each situation on the best terms that it could.

Much is made, both by the Government and by the court below, of the fact that Hartford hoped and expected through these settlements to achieve "dominance". There is no question that the management of Hartford had complete faith in its inventions and the superiority of its machines embodying those inventions. They believed that if they could ever get the patents to whch they were entitled —and settle with the claimants of supplementary non-competing inventions—they would be able to make patented machines so much more efficient and so much better suited to the needs of both large and small glass manufacturers than any theretofore existing that their machines would be accepted and desired by everyone. The very essence of a patent is the grant of a monopoly. If the patent covers a really great advance in the art, the owner—through his patent monopoly over such art—which is desired by all—may even achieve temporary "dominance". That is the incentive which the patent system holds out to inventors and that is the reward which it promises success.

The Patent Settlements.

The settlement agreements whereby Hartford obtained the release of patents on its own inventions from the Patent Office and secured rights with respect to the blocking supplemental and improvement patents held by others, were as complex as the patent conflicts were themselves. It would be impossible, within the short space of this brief, to set

forth the interminable details of the negotiations and the various terms of settlement.

One fact was common to all of these agreements, however, and that fact can readily be grasped. They dealt with patents which were either blocking inventions reading directly on features of the Hartford gob feeder or with supplemental improvement inventions relating thereto.* *Such patents were not competing patents.*

None of the parties with whom these settlements were made had developed an independent system of shaped suspended charge feeding. Their machines were in essence Hartford machines, using basic Hartford inventions. These other parties had fragments of this system—which were incapable of successful commercial operation except in conjunction with the inventions developed by Hartford engineers and embodied in the Hartford machines (Ex. H-5360, R. XXV, 15060; R. III, 1933; R. VI, 4513-29; R. VII, 4740-2; R. VIII, 6218; R. IX, 6460-1; Ex. O-6057, R. XXVIII, 16178, 16183-4).

It is important to understand this because of the fact that it has been customary to refer throughout the industry to feeders by the name of the manufacturer. A reference for example to "the Miller feeder" or "the Howard feeder" or "the T. R. & B. feeder" gives the highly misleading im-

---

* When Hartford sought to introduce evidence to establish these facts, the District Court ruled:

(1) That such evidence was unnecessary and immaterial to the issues of the case—because the Government was not claiming the contrary. See Point I, *infra*, at page 89 *et seq.*

(2) That such evidence accordingly was not generally admissible. See Hartford Assignments of Error, Nos. 9-10 (R. X, 7712-3).

(3) That such evidence, however, was in part admissible as bearing on the "state of mind" of Hartford in entering into its settlement agreements. The evidence thus admitted—illustrative of the general evidence which Hartford had sought to introduce—is herein cited.

pression that the feeder in question was the invention in its entirety of the man whose name it bore, and that it was an independent, alternative development totally different from other feeders (*id.*). Quite the contrary, however, the gob feeders so referred to, by whatever name known and by whomsoever offered, all used basic Hartford inventions (*id.*, note especially R. III, 1933). The patent conflicts were with respect to component parts or elements of the Hartford feeder, not different or alternative feeders (*id.*). With these facts in mind let us turn to the specific settlement agreements and discuss them in chronological order.

1916 Empire agreement

The first settlement agreement negotiated by Hartford was with the Empire Machine Company. Hartford had never heard of the Empire Machine Company until it happened that two of the patent applications filed by Hartford upon inventions of its engineer, Peiler, were placed in interference by the Patent Office with two applications by Chamberlin, an engineer of Empire (Ex. 973, R. XI, 8027; R. V, 3815). The applications of both inventors related to the so-called "heated hood", a means of keeping glass hot at the point where it is taken from the furnace (R. II, 1413; R. VI, 4346). This particular means was being used by Hartford in the paddle feeders which Hartford was at that time putting out (R. V, 3816; R. VI, 4348; R. VII, 4865-6).

The Empire Machine Company was a small engineering company formed by some of the younger men connected with the Corning Glass Works (R. I, 645; R. VII, 5496). Corning was and always had been a manufacturer of special glasses and special non-container glass products. It was not a container manufacturer (R. VII, 5098-9, 5543; R. III, 1718-19).

Empire had been formed in the hope of developing glass machinery for use in Corning's special field (R. VII, 4856-7, 5103, 5505). Corning's products had never been fully automatic (R. VII, 5517; cf. 5098, 5510, 5512-14). The older men at Corning had no faith in these experiments and refused to allow the Corning Company's money to be expended upon them (R. VII, 5103, 5496).

Empire did succeed in developing certain bulb equipment which was useful to Corning. It had not been able, however, to develop any feeder system and by 1915—before the settlement with Hartford—Empire had abandoned its experiments and its engineers had left the company (R. VII, 5513-4, 5528; R. VIII, 5563).

The interference proceedings in the Patent Office brought the two companies into contact. They immediately discovered that there was no real conflict of business interest between them. Hartford's interests were in the container industry, while Empire and Corning were interested in the specialty non-container field (R. VI, 4349-50; R. II, 1413-4). Hartford on the one hand wanted to make sure that the Chamberlin application would not prevent the use of the heated hood in the Hartford feeders, while Empire on the other hand wanted to use the inventions claimed by Chamberlin in its own special field (Ex. 1, R. XII, 8598-9). Consequently it was not difficult to adjust the situation. Hartford and Empire accordingly agreed that regardless of the outcome of the interferences each should have exclusive rights to such inventions as were disclosed by the *applications of its own inventor* for use in its own field—Hartford for the container field and Empire (and through Empire its licensee Corning) for the specialty non-container field (Ex. 1, R. XII, 8598-9, 8600-1).

Empire also sought and obtained, in consideration for this patent settlement, the exclusive right to use the Hart-

ford paddle feeder and the inventions therein embodied in the lines of non-container ware in which Empire's licensee —Corning—had been pioneering (Ex. 1, §9, R. XII, 8601).

1917-1918 patent purchases.

Hartford next disposed of conflicts arising out of a patent application of one Steimer and certain patents which had been issued to one Hitchcock. It was feared that these covered certain features of the Hartford feeder (See as to Steimer, Ex. 3, R. XVIII, 12368A; R. VI, 4351; as to Hitchcock, Ex. 1852, R. XXIII, 14380; Ex. H-5349, R. XXV, 15050B).

Steimer and Hitchcock were individual inventors. Neither of them was in the machine business or had developed any system of feeding machines (R. II, 1398, 1415; R. V, 3815; R. VI, 4353, 4637; R. VII, 4845).

It was believed that the Steimer application—which was in interference with the applications of Peiler and Chamberlin—contained certain claims which might obstruct the "heated hood" which Hartford was using in the paddle feeder (Ex. 3, R. XVIII, 12368A). If this were so Hartford's use of the feeder itself would be blocked (*id.*). Likewise Empire's use of the Chamberlin inventions would of course be nullified. Consequently the Steimer application was purchased by Empire and Hartford jointly, with the understanding that rights under the Steimer application would be divided along the lines of the 1916 agreement (Ex. 5, R. XVIII, 12369).

The two Hitchcock patents involved a means and method of periodically retracting a flow of liquid-hot glass at the orifice of the furnace by the application of a vacuum. Although the device shown in the Hitchcock patents had little apparent resemblance to the Hartford plunger feeder, nevertheless—since the Hartford feeder did use retraction

—it was feared that the Hitchcock patents might block the entire Hartford development (R. VI, 4305, 4361-2).

For this reason Hartford had attempted to buy these patents at the very beginning of its business in 1912, but had been unable to do so because Hitchcock's invention was in the hands of trustees who were scattered and could not deliver title (R. VI, 4305). This and other reasons led Hartford to put out the paddle feeder as its first machine, instead of the plunger type feeder which it preferred, because it thought that the paddle type did not infringe the Hitchcock patents. Later, negotiations with Hitchcock were resumed in 1916 and the Hitchcock patents were ultimately acquired in 1918 (R. VI, 4634; Ex. 1866, R. XIII, 9512 B).

1922 Empire-Corning agreements.

Hartford in the early 1920s took another step, of major importance, which enabled Hartford to continue in business and to solve the patent difficulties which confronted it from other sources.

As previously stated, Hartford by 1920 was in very serious difficulties. Its accumulated losses at that time were over $500,000—several times its original capital investment—and these losses by 1922 had increased to about $765,000 (Stip. Ex. H-5002, R. XII, 8506-16; R. II, 1425-6). Its backers were reluctant to supply more money (R. II, 1423-5; R. VI, 4372). Its patents were tied up in interference proceedings in the Patent Office and it had not yet been able to get its principal patents issued (R. II, 815). Imitators were using copies of its machines without paying royalties (*id.*).

It had been sued for infringement by the largest glass manufacturer, Owens, and the institution of other suits was imminent—threatening to block the use of its gob feed

system altogether (262 Fed. 427 (C. C. A. 2nd); R. VI, 4355; R. VIII, 6041-2).

Owens had made an effort to buy Hartford out and the Hartford backers were so discouraged that they were seriously considering taking this way out (R. II, 1424-5; R. VI, 4353-4).

Finally, in desperation, Hartford turned to Empire. Empire was in the possession of very considerable funds and had a steady income from royalties on inventions (not relating to glass container manufacture) which it had made during its previous active period (R. II, 1433-4; R. VI, 4373). Empire had been out of any research activity for many years (R. VII, 5513-14) but it was familiar with Hartford's inventions and was willing to arrange to finance Hartford in return for a considerable interest in its stock and certain revisions in the agreements theretofore existing between them (Ex. 7, R. XVIII, 12371, 12374-5).

There was no competition between Hartford and Empire, or between Hartford and Empire's client, Corning. Hartford's interests were entirely in the container machinery field (R. II, 1413; R. VI, 4349-50; R. VII, 4866). It had no thought or purpose of becoming a glass manufacturer nor did it have the means to do so (R. II, 1426-7). Corning, on the other hand, was exclusively a manufacturer of specialty glassware (R. VII, 5098-9) and had no intention of entering the container field (R. VII, 5543). As for Empire, it had ceased all development work back in 1915 and thereafter was a mere conduit for the collection of royalties (R. II, 1433; R. VII, 5514).

Negotiations turned principally upon the question of values. Empire naturally expected a substantial interest in the new company and in the course of bargaining even threatened itself to commence machine development work (Ex. 7, R. XVIII, 12374). This, however, was obviously

nothing more than mere talk. Mr. A. B. Houghton, speaking for Empire, wanted a 50% interest in the new company, but Hartford thought this too much (Ex. 7, R. XVIII, 12374; Ex. C-5662, R. XXVI, 15367). Empire eventually agreed to accept a 45% stock interest, of which one-tenth was returned to the new company for issuance to its employees (R. II, 1433; Ex. 16, §§9, 10, R. XVII, 11947-8). A substantial agreement was reached in 1920 but the definitive agreements were not finally executed until 1922 (Ex. 16, R. XVII, 11943; Ex. 19, R. XII, 8606A-8629).

As a result of these agreements, Hartford and Empire, in substance, were merged into a new company, the present Hartford-Empire Company.* Empire, in return for its financial assistance, received its agreed share of the new Hartford common stock. In addition, for the protection of Empire's investment, the charter provided that the new company should not go into a new business—the manufacture of glassware—except with the consent of 65% of its stockholders (Ex. 16, R. XVII, 11943, 11957; R. VII, 5545-6).

Corning replaced Empire as a party to the earlier 1916 patent license agreement—having previously received an assignment of Empire's rights thereunder (Ex. H-5395, R. XIII, 9626)—and the license involved was somewhat enlarged. Corning's rights in the earlier type of Hartford feeder were extended to the improved feeders and any that might be developed thereafter (Ex. 19, §7, R. XII, 8625; R. VII, 5542). Hartford, on the other hand, was to receive certain rights in the container field in case Corning should obtain any machine inventions which would be useful

---

* Empire maintained a corporate existence until January, 1941, when it was dissolved, but its principal assets were turned over to Hartford in 1922 (Ex. 16, §4, R. XVII, 11945). At the time of dissolution Empire held about 43% of Hartford's issued common stock (Ex. 1583, R. XI, 8095, 8099, 8106B).

to Hartford in that field (Ex. 19, §14(c), R. XII, 8628). Corning never did acquire anything useful in the container field so this provision was never of any assistance to Hartford (R. VII, 5545, 4786).

There were also certain provisions for interchanging rights in special glass developments, but these never amounted to anything. Hartford never developed any special glasses and Corning never developed any which were commercially usable in Hartford's field (R. II, 1434; R. VI, 4375). The exchange of these glass rights can therefore be disregarded.

The 1916 and 1922 agreements with Corning were terminated by a cancellation agreement dated September 23, 1940 (Ex. H-5030, R. XIII, 9540), accompanied by the transfer to Corning of three patents (two of which have since expired) which were not being used by Hartford in the container field and an agreement by Hartford to pay Corning $1,125,000 for the relinquishment of its license (Ex. H-5031, R. XIII, 9542).

Corning is today a *non-exclusive* licensee under the Hartford patents—paying standard royalties.

1924 Owens agreement.

Hartford then turned to solving its patent conflict with Owens.

The Owens Company had long given up licensing its "suction" machines to others (R. III, 2295-6; R. VIII, 6227). It realized the possibilities of the new Hartford gob feed system, however, and the fact that Hartford would obtain dominant patents on that system (Ex. O-6057, R. XXVIII, 16178, 16183-4; R. III, 1932-3; R. IX, 6460-1). Accordingly, Owens aggressively asserted substantial patent rights of its own reading on part of this system.

As previously stated, Owens brought four infringement suits successively against either Hartford or a Hartford

licensee (whom Hartford had undertaken to protect) under various patents, including the Brooke, Brookfield and Lott patents alleged to cover phases of the Hartford feeder (262 Fed. 427 (C. C. A. 2nd); R. VI, 4355; R. VIII, 6041-2).

Owens also owned patent applications which were involved in 27 different interferences within the Patent Office, which had kept the Hartford patents tied up since 1918 and so contributed to the deadlock which prevented the issuance of Hartford patents (Stip. Ex. 973, R. XI, 8027-30).*

Hartford's licensees feared infringement suits by Owens. They had been served with infringement notices by Owens (Ex. O-6030, R. XXVIII, 16158, 16163; Ex. H-6153, R. XXVIII, 16278), and were accordingly demanding protection from Hartford—as they had a right to do under the obligations undertaken by Hartford in its licenses (*e.g.* Ex. 1625, §16, R. XIII, 9394-5; R. V, 3825).

Hartford itself frankly feared Owens. Hartford's own patent attorneys believed that at least one of the Owens patents—namely, the so-called "Baby Lott" patent—covered a structural feature (the direct alignment of plunger, orifice and shears) which plunger type feeders necessarily employed (R. V, 3825-7; R. VI, 4384; R. VIII, 6046-9)—and also had claims on a so-called "clarinet" valve (which read on the paddle-needle feeders) (Ex. H-5551, R. XXVI, 15303-6; R. VI, 4383). A second Lott patent also related to another important feature of the Hartford system, "necking before shearing" (R. VIII, 6045-6). These patents threatened the very existence of Hartford (Ex. H-5006, R. XXIV, 14694; R. II, 1439, 1443; R. V, 3825; R. VIII, 6047-8).

---

* Interferences involving Owens' applications of Lott, Owens, Soubier, Ferngren, LaFrance and Whittemore.

It was obvious that the only practical thing for Hartford to do was to arrive at some settlement with Owens—particularly because Owens not only had a strong patent position with which to block the Hartford feeder, but it was also the largest and strongest company in the container industry and well able to carry on its patent litigation against Hartford indefinitely. Settlement was not an easy matter, however.

Mr. Michael J. Owens, founder and active head of the Owens Company, was an exceedingly hard bargainer. During the early negotiations in 1921-1922 he made certain demands and advanced certain proposals to which Hartford objected. These proposals were rejected and the negotiations were definitely broken off (R. II, 777-8; R. III, 1760-1; R. V, 3828).

Some time later, however, the negotiations were resumed on a different basis (Mr. Owens having died in the meantime) and in 1924 a settlement agreement was finally entered into between Hartford and Owens (Ex. 55, R. XII, 8629).

This settlement agreement had nothing whatever to do with patents on the Owens "suction" system. It covered solely patents relating to feeders and supplementary formers (*id.*, §1, R. XII, 8630). Under this settlement Hartford freed itself—and its gob feed system—from the deadlock created by the blocking Owens patents. Hartford received an exclusive license (changed to non-exclusive in 1932) under the Owens feeding and supplementary forming machine patents, with power to license others, subject to shop rights reserved by Owens itself (*id.*, §2, R. XII, 8632-3).

Owens, in turn, received a non-exclusive license for the container field to use the Hartford "gob feed" patents (*id.*, §3, R. XII, 8633).

Hartford was forced to recognize the importance of the Owens patent position, however, by making certain additional concessions, all of which were eventually wiped out and eliminated long before the present suit was brought. These concessions were:

(1) That Owens should have a right to a share in the income from royalties received by Hartford in licensing the complementary Hartford-Owens patents. Owens at first demanded a full half share but compromised on receiving half after Hartford had first received $600,000 a year (*id.*, §6, R. XII, 8635; R. IX, 6475). The cost of this concession was borne solely by Hartford, which authorized its licensees to use the additional Owens patent rights without any increase in royalty rates (R. VI, 4679-80; R. VIII, 5808-9). Owens' right to share in the royalties was reduced by later agreement and eventually terminated altogether in 1935 (Ex. 568, §§ 1, 4; R. XII, 9109, 9110-1).

(2) Owens agreed to pay royalties but was at first entitled to the use of 40 Hartford feeders (with supplementary formers) without royalty (Ex. 55, §5; R. XII, 8634). This right to free feeders was terminated in 1932 and at the same time the Hartford license under the Owens patents was changed from exclusive to non-exclusive (Ex. 144, §1; R. XII, 8783, 8784; Ex. 145, §5; R. XII, 8787, 8792).

(3) Owens insisted upon the right to withhold consent to any sub-licensing by Hartford *under Owens's own patents* (Ex. 55, §22; R. XII, 8640; Ex. 52, R. XVIII; 12524, R. III, 1780-1). Prior to the Hartford license, of course, Owens had a veto over anybody using its patents, including Hartford. This reserved right, in connection with the Hartford license, did not add anything to Owens's veto

power but, on the contrary, decreased it—particularly since it was subject to very wide exceptions permitting Hartford to grant licenses without Owens's consent to Hartford's existing licensees and to other glass manufacturers of "good commercial and financial standing". This so-called veto was one of the features eliminated along with others during 1931-1935 (Ex. 411, R. XII, 9102).

The parties also agreed, subsequently, that Owens should share in the expense of infringement litigation (Ex. 114, R. XVIII, 12599; Ex. 119, R. XVIII, 12620; R. V, 3670-1). This was natural so long as Owens was sharing in the royalties. The provision as to sharing litigation expenses was also terminated in 1932 (Ex. 121, R. XIX, 12631).

Some years after the original agreement, Hartford did extend to Owens a non-exclusive license in any "suction" patents it might have (Ex. 571, R. XII, 9125). Hartford's "suction" patents, however, were not found to be of commercial use (R. VII, 4797); and, as previously stated, for many years the "suction" process has been free to anyone who desires to use it (R. IX, 6663).

To recapitulate, long before the time this suit was brought the arrangements between Hartford and Owens *had for years consisted merely of an exchange of non-exclusive licenses,* with a limitation, in the case of the Hartford license to Owens, to the container field. And on October 8, 1940, even this limitation was waived and Owens became and is today free to use the Hartford inventions in any field whatsoever—paying the usual royalties therefor.

Owens' proportion of the glass container business, it should be noted, has been declining steadily during recent years. In 1933 Owens' sales represented 39.36% of the industry business; in 1935, 38.06%; in 1938, 35.25%; and in 1939, 34.97% (Ex. GCA-6090, R. XXVIII, 16250).

1922-1925 settlements.

As previously stated, after the Hartford machines came out, but before its most important patents issued, certain concerns began to put upon the market machines which embodied in essential respects the fundamental Hartford inventions. Among these were the following:

Howard (Ex. H-5360, R. XXV, 15060; R. VI, 4512-29),
Tucker, Reeves & Beatty (Federal) (*id.*),
W. J. Miller (*id.*).

Hartford or its licensees during the early days had had calls by representatives of each of these parties. They had observed the construction and operation of the Hartford feeders and had thereafter constructed similar machines which they distributed under their own names (Ex. H-5345, R. XXV, 15033; R. II, 1415-7; R. VI, 4330). All of these machines embodied basic Hartford inventions on which Hartford eventually obtained patents (R. III, 1933; R. VIII, 6218).*

Moreover, these copyists had filed patent applications involving one or more features of the Hartford machines—plus certain improvements thereon—and endless interferences ensued (Stip., Ex. 973, R. XI, 8028-31). The procedure of the Patent Office was at that time so cumbersome that an interference, once commenced, was almost impossible to terminate when, as here, the adverse parties opposed (Ex. H-5499, R. XXVI, 15255). Indeed two of these concerns openly demonstrated their intention to keep the interference proceedings going indefinitely and their expectation that they would be able to do so (R. V, 3869; Ex.

---

* See also Ex. H-5248, R. XIV, 10323 (patent 1,573,742); Ex. H-5249, R. XIV, 10401 (patent 1,655,391); Ex. H-5284, R. XIV, 10437 (patent 2,073,572).

H-5481, R. XXVI, 15233; R. VII, 5009; R. VIII, 6060). In the aggregate, 24 interferences were pending between applications of these parties and those of Hartford at the times the agreements with them were signed, and it was known that in the case of Howard others would be declared in the near future (Ex. H-5410, R. XXV, 15132, 15136-7; Ex. H-5875, R. XXVII, 15523-4).

Under the circumstances, it is not surprising that the licensees of Hartford felt aggrieved. For other container manufacturers were using the machines of these imitators without paying royalty to Hartford, and were thereby enabled to undercut the prices of the Hartford licensees. The licensees threatened to cease paying royalties to Hartford unless this condition was corrected (Ex. H-5006, R. XXIV, 14694, 14696; R. V, 3825; R. II, 815; R. VIII, 6059).

Likewise, under the circumstances, it is not surprising that the record contains correspondence by Hartford executives evidencing the exasperation and frustration which they felt and referring to these imitators as "pirates" (*id.*). These companies, by preventing the issue of the Hartford patents, constituted a very real menace to the continuance of Hartford's existence. Until Hartford could get its principal patents out it could not expect to obtain the rightful benefit from its inventions. The primary purpose of settling with these companies was, therefore, to enable Hartford to break the log jam in the Patent Office and get its patents issued—and thereby to prevent the unauthorized use of Hartford's inventions (R. II, 810-1, 1447).*

Hartford also sought to settle because it was impossible for Hartford to know just what dates these claimants would

---

* See also: As to Howard, Ex. 58, R. XVIII, 12535-6; R. VI, 4415; R. VII, 4897-8. As to TR&B, Ex. 74, R. XVIII, 12565; Ex. H-5851, R. XXVII, 15507; R. V, 3833; R. VIII, 6060. As to Miller, Ex. H-5010, R. XXIV, 14709; R. V, 3659; R. VIII, 6060.

be able to prove in the various interference proceedings, and it was entirely possible that one or more of them might emerge from the Patent Office with something in the way of patents covering sufficiently important—though fragmentary—features to deadlock Hartford in the most effective use of its inventions (though in the case of Miller at least, it was felt that he had nothing but "nuisance value"). (See as to Howard, Ex. 58, R. XVIII, 12535; R. II, 810-11; as to Tucker, Reeves & Beatty, Ex. 1904, R. XXIII, 14441; as to Miller, Ex. H-5007, R. XXIV, 14701; Ex. H-5010, R. XXIV, 14709-11).

On the other hand these concerns all used basic inventions that were originated and used by Hartford (R. II, 812; R. III, 1933; R. V, 3828; R. VIII, 6218).

Eventually, settlements were reached with each of these parties. Howard was purchased outright in 1922 (Ex. 61, R. XII, 8665), Tucker, Reeves & Beatty sold its patents and license rights to Hartford in 1925 (Ex. H-5504, R. XIII, 9632) and Miller's feeder patent rights were acquired about the same time in 1925 (Ex. 80, R. XVIII, 12579; Ex. 82, R. XII, 8717). Owens, whose patents and patent rights had also been infringed, and who was sharing in Hartford's royalty income, contributed to certain of the settlements (Ex. 80, R. XVIII, 12579, 12589).

The industry users of "Howard", "Federal" (Tucker, Reeves & Beatty) and "Miller" feeders received licenses from Hartford to continue using their old equipment or to substitute Hartford equipment if they so desired (Ex. H-5749, R. XXVII, 15435; Ex. 152, §2, R. XII, 8840).

1932 Hazel-Atlas agreement.

The last important patent settlement of the feeder patent deadlock was the settlement with Hazel-Atlas in 1932. This company, the second largest manufacturer in the container

industry, had used the Hartford feeder inventions (Ex. 142, preamble, R. XII, 8765), and for many years had engaged in constant litigation with Hartford (Ex. HA-5073, R. XXIV, 14758).

Hazel-Atlas assisted Owens in the infringement suit brought against Hartford under the Brooke patent in 1917 (Ex. O-6030, R. XXVIII, 16158-61; R. II, 1419; R. VI, 4354). It was joined by Owens as co-plaintiff in the infringement suit against a Hartford licensee brought under the Brookfield patents in 1923 (Ex. O-6028, R. XXVIII, 16153). Conversely, as Hartford's own patents issued it brought suit promptly against Hazel-Atlas—which was then the largest infringer—and against the Kearns Gorsuch Bottle Company, a wholly-owned subsidiary of Hazel-Atlas (Stip., Ex. 973, R. XI, 8023-4).

There were also seven Patent Office interferences pending between Hartford and Hazel-Atlas during the period from 1916 to 1931 (R. IV, 2510; Stip., Ex. 973, R. XI, 8027-31; Ex. H-5398, R. XXV, 15095).

Moreover, Hazel-Atlas claimed that under previous arrangements with Owens it was entitled to an exclusive license under the Lott and other Owens patents for producing certain very important kinds of glassware, and that because of this previous agreement Owens had had no power to license Hartford under these patents (Ex. 910, R. XXI, 13567-8). Hartford did not know of these claims at the time it entered into its 1924 agreement with Owens (Brown affidavit, R. I, 497, 499-500).

Under the Hazel-Atlas agreement of 1932 Hartford and Hazel-Atlas exchanged non-exclusive licenses under their respective feeder and supplementary forming machine inventions (Ex. 142, §2, 5, R. XII, 8766, 8770).

To discuss fully the terms of the agreement would confuse the real substance of the transaction. It was

an exchange of non-exclusive licenses. Hazel agreed to pay royalties to Hartford on the machines used by it,—whether supplied by Hartford or constructed by Hazel—in so far as embodying the licensed inventions (*id.* §3, R. XII, 8767). On the other hand, Hartford agreed to pay Hazel one-third of the royalties received by it over and above the sum of $850,000 a year (*id.* §6, R. XII, 8771).

Owens, who would have been in a somewhat difficult position if it had turned out that it had sold patents short to Hartford (R. IX, 6479), contributed to this settlement (Ex. 1778, R. XXII, 14266), cutting its own participation in Hartford royalties from one-half to one-third and consenting to increase the initial deduction from $600,000 to $850,000 a year before sharing of royalties began (as previously stated, Owens ceased altogether to have any share in Hartford's royalties in 1935). Owens further surrendered its right to use 40 feeder-former units free of royalty payments (Ex. 1778, R. XXII, 14266-7).*

The Hazel-Atlas claim of exclusive rights under the Owens patents—and particularly the Lott patents—if sustained, would have been an exceedingly serious matter to Hartford and its licensees. The Lott patents covered essential parts of the Hartford feeders (R. VII, 5236; R. VIII, 6047-8; R. IX, 6463). That had been one of the principal reasons for the Owens settlement (R. I, 498-9). Hartford had agreed to indemnify its licensees against infringement damages (*e. g.*, Ex. 1625, §16, R. XIII, 9394). If Hartford was accountable to Hazel-Atlas for the infringeing production of all its licensees the damages might have run into millions of dollars (Brown affidavit, R. I, 501).

---

* Contemporaneously Owens entered into certain arrangements with Hazel-Atlas, which will not be discussed here as Hartford was not a party thereto.

In addition to the possibility of money damages there was the even more serious danger that Hartford's licensees might be enjoined from using the Hartford feeders at all, within the large field in which Hazel-Atlas claimed exclusive rights. Owens' counsel, W. J. Belknap, had given an opinion as of December 27, 1927—subsequent to the Owens-Hartford settlement—in which he said:

> "The result of my consideration of the Hazel situation is that I am unable to state definitely whether or not Hazel has the exclusive right to improvements made by Owens" (Ex. O-6000, R. XXVIII, 16068, 16073).

Theoretically Owens would have been liable over for any money damages that Hartford might have to pay—but nothing could have compensated Hartford for an injunction against the use of its machines. This possible accountability, however, gave Owens a special interest in the settlement (R. III, 1975-6; R. IX, 6479).

To summarize, the considerations going to Hartford from the Hazel settlement were as follows:

1. $1,000,000 cash damages for past infringement paid by Hazel-Atlas (half to Owens) (Ex. 142, R. XII, 8764, 8766; R. III, 1978).
2. $250,000 more cash royalty retained exclusively by Hartford each year, deductible before royalty sharing with either Owens or Hazel (Ex. 1778, R. XXII, 14267; R. II, 908).
3. Reduction in Owens' sharing of Hartford's royalties in excess of $850,000 from one-half to one-third (Ex. 1778, R. XXII, 14266).
4. Expected royalties from Hazel of $100,000 to $200,000 a year over and above its one-third share in Hartford's royalties. Repeal of Prohibition altered this but was not foreseen or expected (Ex. 1655, R. XXII, 14079, R. II, 909; R. IV, 2394).

5. Relinquishment by Owens of the right to use 40 feeder-formers royalty free—this had an actual going value of $100,000 in royalties and a potential value of $440,000 a year (Ex. 1778, R. XXII, 14267).

6. A release to Hartford and its licensees from any claim by Hazel to damages or injunction by reason of patent infringement (Ex. 142, §5; R. XII, 8770).

7. Non-exclusive rights under Hazel's feeder and former patents—including five Hazel patents that were actually then being used by Hartford in the forming machines which it was then offering to the public (R. VIII, 6219).

8. The benefit of anything which Hazel's large and able force of engineers might invent (and the know-how they might develop) for the duration of the contract. Hazel had seventy research and development men (Ex. 142, §6, R. XII, 8771; Carnahan affidavit, R. I, 488).

9. Finally the agreement put an end to the patent warfare between Hazel and Hartford that had plagued both companies for many years.

In conclusion, it should be remembered that:

The licenses were only *non-exclusive.*

Each remained as free as before to issue licenses under its own patents to others.

Hazel was not engaged in the machinery business.

Hartford was not engaged in the glass business.

Hazel's proportion of the glass business—far from being increased by the 1932 agreement—has declined relatively to the rest of the industry. In 1928 Hazel's sales represented 17.07% of the industry business; while in 1939 it represented 16.03% of such business (Ex. GCA-6090, R. XXVIII, 16250).

Miscellaneous minor feeder agreements.

In addition to the foregoing settlements—Hartford also entered into a number of minor transactions which were in reality *de minimis*. To adopt the language of this Court in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32:

> "Some of them were merely of accessorial machines; some in composition of patent troubles; some not connected with the special charge of monopoly to which the Government has limited itself; some the transfer to defendants of kinds of machines not possessed by them; some of patented improvements and inventions, aiding or completing the defendants' machines, tributary therefore to their efficiency. They give a false impression by their number. They added nothing of obnoxious power to the United Company nor in any practical or large sense removed competition" (p. 54).

So here miscellaneous improvement patents of minor importance were offered to Hartford from time to time. Concerns going out of business occasionally approached Hartford with odds and ends of patents which Hartford acquired for relatively small sums, as in the case of Bethel (Exs. H-5906, H-5910, R. XXVII, 15602A, 15605).

Other concerns, being charged by Hartford with infringement, sought to reduce their liability for damages by the transfer of minor patent rights, as in the case of Tygart Valley (Ex. 1636, R. XIII, 9450) and Fairmount (Ex. 1618, R. XIII, 9358).

Rankin had a patent upon a movement of a sleeve surrounding a plunger. There was little similarity to the Hartford feeder in this respect but there was a verbal resemblance. By threats of an infringement suit, Rankin was able to sell his patents to Hartford in 1928 for their nuisance value (Ex. 111, R. XVIII, 12597).

Lynch granted to Hartford an exclusive license—subsequently made non-exclusive—under such feeder patents as it possessed (Ex. 329, R. XII, 9065; Ex. H-5028, R. XIII, 9538).

Kucera was a Czech who had supplied the Knox Company with some infringing feeders. When Knox settled with Hartford for its own infringement, it asked Hartford as part of the settlement to relieve it from its obligations to Kucera (R. III, 1561). As a result, Hartford acquired two unimportant patent applications and agreed to furnish Kucera feeders to any Hartford customers who should order them (Exs. 565, 566, R. XII, 9103, 9105, 9108). The Kucera feeder, however, though utilizing basic Hartford inventions, was much inferior to the original put out by Hartford, which as the Government conceded is "the best feeder in America" (R. VI, 4467). No one has ever ordered any Kucera feeders (R. V, 3614).

Forming machine settlements.

The feeding methods and machines discussed above are the heart of the Hartford system. In actual operation, however, it is necessary for them to be used in conjunction with certain other machines called formers. These formers contain the molds into which the suspended charges are "fed". They must be so designed and constructed as to operate in perfect synchronism with the feeders. To achieve maximum efficiency on the part of the feeders, the formers must be able to form the containers as rapidly as the feeders feed the glass to them. The two elements operate as a single organic unit—the feeder being useless without the former (R. VI, 4320).

When Hartford put out its feeders no suitable forming machine existed for use in conjunction with its feeders —consequently Hartford proceeded to develop them

(R. II, 1407; R. VI, 4321-2, 4325-6, 4368). It ultimately found, however, as in the case of the feeders, that the manufacture and use of its improved forming machines were blocked by patent applications—on the part of other companies—which eventually ripened into patents (See, *e. g.*, Ex. 330, R. XII, 9067, 9068; and Ex. H-5887, R. XXVII, 15552). A patent deadlock developed with respect to formers similar to the patent deadlock with respect to feeders.

No one could safely build the forming machines of the modern and efficient type which were necessary to permit the effective operation of its automatic feeders. The result was a perfect deadlock.

An important phase of this deadlock centered around interference proceedings, and collateral infringement claims, involving

The Sears & Lobb applications (Ex. H-5882, R. XXVII, 15543).

The Headley & Thompson applications (Ex. 292, R. XIX, 12833).

The Lynch and Bridges patent owned by the Lynch Corporation (Ex. H-5950, R. XXVII, 15654).

It was not clear for a long time who would eventually obtain the patents, but it became increasingly apparent that whatever patents were obtained would block the Hartford development (Ex. H-5502, R. XXVI, 15256; Ex. 292, R. XIX, 12833-4; Ex. H-5950, R. XXVII, 15654). On the other hand, it also became clear that none of the other companies who owned these applications would by themselves be able to manufacture forming machines of the modern and efficient type because of Hartford's essential inventions (Ex. H-6052, R. XXVIII, 16171; R. VIII, 5677, 5690-1, 5644-5, 5681). To cut through this patent deadlock Hartford first purchased the Sears & Lobb applications (Ex. 307, R. XII, 9056-9; Ex. H-5882, R. XXVII, 15543).

It developed, however, that Sears & Lobb were antedated by Headley & Thompson (Ex. H-5523, R. XXVI, 15273-6; R. VII, 5085).

The Headley & Thompson applications were very broad in character and covered vital parts of every modern and efficient feeder-fed forming machine known for making narrow-neck bottles—including the machines developed by Hartford (Ex. H-5887, R. XXVII, 15552; R. VI, 4447; R. VIII, 6083-6). Accordingly, Hartford acquired the Headley & Thompson applications from their owners—the Whitall Tatum Company (Ex. 336, R. XII, 9083, 9089-90). Owens (which was then sharing in Hartford's royalty income and was using forming machines embodying these inventions), assisted in making this purchase (Ex. 337, R. XII, 9087).

This acquisition, however, did not clear up the patent deadlock as to formers. The Lynch company—which was engaged in developing rival forming machines—notified Hartford that the latter was infringing certain patents, particularly the Lynch and Bridges patent covering the so-called "transfer device". This device is roughly analogous to the mechanism which shifts phonograph records in an automatic phonograph. In a forming machine the transfer device shifts the partly blown container from the first mold to another mold, in which the container is completed (Ex. H-5101, R. XIV, 9901; R. VIII, 5666-7). This patent read directly upon the Hartford forming machines, and Hartford itself believed that the patent would prevent the use of any such machines by Hartford or its licensees (Ex. 1001, R. XXI, 13662-C; R. VIII, 5664-7).

Hartford replied to the Lynch infringement notice by notifying Lynch in turn that the Lynch machines were infringing Hartford patents—and Hartford was confident that it could maintain this claim (Exs. 1002-3-4, R. XXI, 13663-5).

These events finally led to a settlement by means of an interchange of *non-exclusive* forming machine licenses (Ex. 330, R. XII, 9067).

Lynch gave Hartford a non-exclusive license to use the Lynch patents in the Hartford forming machines. Hartford gave Lynch a non-exclusive license to use the Hartford patents in the manufacture of Lynch forming machines—and to supply Lynch machines embodying the Hartford patents to anyone who had received from Hartford a license to *use* such forming machines (*id*, §3, R. XII, 9071).

There was no covenant on the part of either company to use the other company's patents. And no covenant which would prevent either company from manufacturing unpatented machines if it should be able to do so (Ex. 330, R. XII, 9067). Lynch at first required Hartford to pay royalty in the event Hartford's forming machines of a certain type using the Hartford-Lynch patents exceeded specified amounts (Ex. 330, §8, R. XII, 9073), but this requirement was dropped in 1938 before this suit began (Ex. 340, R. XII, 9091-3).

The Lynch Corporation has continued to manufacture forming machines in vigorous competition with Hartford (R. IV, 2849).

Hartford also entered into another minor transaction with respect to forming machine patents, namely the settlement with O'Neill of the O'Neill Machine Company—which is no longer of consequence.

O'Neill in 1933 had obtained a patent for a certain feature of the transfer device which was used in Hartford forming machines (R. VIII, 5686-7; Ex. H-5691, O'Neill

patent 1,906,086, fol.* 23826). O'Neill had also made an attempt to market a suction machine, which was unsuccessful—failing to live up to its advance representations (R. II, 1072; R. III, 1556-7).

O'Neill was anxious to sell out and retire (R. II, 1069-70). He had made previous efforts to sell out to Owens and also to Hartford in 1925, in 1929 and in 1931, but both companies had refused to buy (Ex. 648, R. XX, 13311; R. II, 1065-6, 1517; R. III, 2168).

In 1933, however, Owens became interested in O'Neill's "stationary pot" patents which Owens then believed would increase the efficiency of its suction machines (Ex. 1651-a, R. XXII, 14071; R. III, 2170-1). O'Neill was not willing to sell these patents apart from his entire business (R. III, 2171). Consequently Owens agreed to buy the entire business (Ex. 263, R. XII, 8972). Because of the fact that O'Neill's patents relating to forming machines might constitute the basis for a suit for infringement against Hartford, Owens tried to recoup itself in part for this purchase by suggesting that Hartford take over such of the O'Neill patents as would be useful in the Hartford business (R. III, 2171-2). Hartford was willing to do this, paying $86,000 for the lot because Hartford's forming machines clearly used some of the O'Neill patents (Ex. 265, R. XII, 8995-6; R. II, 1070; R. VI, 4161; R. VII, 4755).

The O'Neill machines, on the other hand, clearly infringed certain of Hartford's forming machine patents (R. VIII, 5686).

---

* Folio references occasionally appearing herein are to portions of the record on appeal not printed, but to which reference can be made by stipulation between counsel (R. XXVIII, 16531). Where such reference is of particular interest, the portion of the record thus mentioned is printed herein.

Lehrs and stackers.

The Hartford feeder is used in conjunction not only with formers, but also with additional equipment known as lehrs and stackers (Ex. H-5357, R. XXV, 15059; R. VI, 4491-2).

Lehrs are annealing chambers in which the glass is first heated and then slowly cooled (R. VI, 4487).

Stackers take the ware delivered by the formers and place it in the lehrs (R. VI, 4491-2).

Although Hartford and all of the defendants are adjudged to have restrained trade with respect to lehrs and stackers, this holding is completely unjustified.

The fact is that the Hartford lehrs and stackers were developed by Hartford—through the efforts of its own engineers (Ex. H-5918, R. XIV, 10956; R. VIII, 5691).

Lehrs.

When Hartford began business, glassware was annealed in large masonry lehrs. To take care of the increased production resulting from its high-speed machines, Hartford developed a new and improved form of lehr—which completely revolutionized the industry. The effect of this invention can most simply be summarized by quoting from the case of *Hartford-Empire Co.* v. *Swindell Bros.*, 96 F. (2d) 227 (C. C. A. 4th), aff'd on rehearing 99 F. (2d) 61, certiorari denied 306 U. S. 634:*

> *"The result of the invention embodied in plaintiff's structure has been to revolutionize the art of annealing* the type of glassware produced by the automatic forming machines. Loss from breakage has been reduced from 5 or 10 per cent. to less than 2 per cent. Annealing time has been reduced from approximately 10 hours to an hour and a half. Fuel costs have been greatly reduced, one witness stating

* Italics ours herein, unless otherwise noted.

> that the improved lehr takes care of three and one-half times as much ware as the old type at probably one-fifth of the fuel consumption. And a considerable saving of labor in transferring the ware from the forming machine to the lehr and in tending the lehr has been effected. In short, so manifest are the advantages of the new lehr of the reissue patent that use of the old brick lehr of the prior art has been almost completely abandoned" (p. 229).

The Amsler-Morton matter—which was referred to by the court below in connection with lehrs—involved a controversy with an infringer. Hartford did not acquire any patents or patent rights thereby.*

Amsler-Morton had been building the old masonry lehrs. After Hartford brought out the new lehr, Amsler-Morton copied it (*Swindell Bros.* decision, *supra*). Hartford offered a license to Amsler-Morton but the license was rejected (R. III, 1874; Finding 355, R. X, 7352). Eventually Hartford brought suit against a user of the Amsler-Morton lehrs and Amsler-Morton was adjudged an infringer by the Circuit Court of Appeals, Fourth Circuit. On rehearing the decision was reaffirmed by the same court (R. III, 1892). These decisions were rendered in the *Swindell Bros.* case quoted above. Following these decisions Hartford extended licenses under its patents to the infringing users of these Amsler-Morton lehrs (Ex. H. 5070, R. XXIV, 14754-6).

Two other matters are possibly of interest—one relating to Nagle and the other relating to Owens.

Nagle—a former employee of Hartford—built some lehrs of the Hartford type for Thatcher. Hartford threatened to sue Thatcher (Ex. H-5321, R. XIII, 9619-23). Thatcher subsequently conceded infringement and was

---

* The court found that an attempt had been made to purchase Amsler-Morton, but there is no evidence that Hartford had anything to do with this (R. III, 1888-9).

thereafter licensed by Hartford to use the infringing lehrs (*id.*). There was no evidence—and no claim—that Hartford was not right in its contention.

Owens developed a form of lehr heated by electricity instead of by gas or oil to conform to the special requirements of its suction machines—which requirements differ somewhat from the requirements of gob feeding machines (R. IX, 6428-32, 6435). In order to be free to manufacture these special lehrs for its own use, Owens exchanged with Hartford non-exclusive licenses on patents specifically relating to lehrs (Ex. 580, R. XIII, 9213. See R. IX, 6438-9). Where Owens uses fuel-fired lehrs covered by Hartford patents, it pays standard royalties (*id.*, §4, R. XIII, 9216).

Stackers.

The Hartford stacker is purely the product of Hartford's own engineers, embodying patented inventions developed by Hartford research (R. VIII, 5691). No patent that was ever acquired by Hartford from others applies to it (*id.*).

Neither Hartford nor anyone else has ever had any controlling patents on stackers (R. VIII, 5692).

The absence of any controlling stacker patents is demonstrated by the existence of many competing stackers other than those distributed by Hartford (R. VIII, 5692).

Hartford's Exercise of Patent Rights.

The foregoing settlement agreements eventually ended the patent deadlocks and Hartford's patents—covering Hartford's basic inventions—became generally recognized and respected.

Awards of priority.

The interference proceedings, which had prevented the issue of certain of Hartford's patents, were terminated fol-

lowing these settlements after the most careful consideration of the evidence (R. VII, 4921-3; R. VIII, 6051-2, 6063-5). The parties sought to avoid the award by the Patent Office of the patents to the wrong inventors (R. VI, 4068)—because such would have been fatal to the validity of the patents issued. *Cf. United Chromium, Inc.* v. *General Motors Corp.*, 85 F. (2d) 577 (C. C. A. 2d).

The correctness of the awards thereupon made by the Patent Office in the interference proceedings is not here challenged by the Government (Stip., R. VIII, 5635).

The Government has expressly stipulated that it is not here contesting either the validity of any of the patents or any award of priority—disclaiming:

> " '(a) That plaintiff does not and will not, in this suit, contest or question the validity of any patent or patents and that it is not necessary for said defendants to offer any evidence to support the presumption of validity of any patent or patents; and
>
> " '(b) That plaintiff does not and will not, in this suit, contest or question the correctness or propriety of any award of priority by the United States Patent Office in any interference, and that it is not necessary for said defendants to offer any evidence in support of said awards' " (Stip., R. VIII, 5635).

Infringement suits.

Once Hartford's important patents were issued, suits for infringement were brought thereon to require the non-licensed industry users of Hartford's inventions to take out licenses and pay royalty therefor (Stip., Ex. 973, R. XI, 8023). These suits were necessary because during the years of confusion—in which Hartford was tied up by litigation and interference proceedings—copies of Hartford's machines had been installed by glass container manufacturers without Hartford authorization (R. III, 1933; R. VI,

4513-29; R. VIII, 6218). It would not have been fair to Hartford's licensees for Hartford to permit this infringement to go on indefinitely. Indeed the Hartford licensees would very likely have stopped their royalty payments if infringers had been permitted indefinitely to use the Hartford inventions royalty free (Ex. H-5006, R. XXIV, 14694, 14696; R. II, 815; R. VIII, 6059). No licensor can expect to continue licensing if he fails to prosecute infringement.

The Government has expressly conceded that all of these suits were brought in good faith and in an honest belief in the validity of Hartford's patents and their infringement by the defendants (Stip., R. VI, 4296; folios 11803, 11808-9). Moreover, Hartford's patents were sustained in adjudicated cases (Stip., Ex. 973, R. XI, 8023-5).

Hartford did not, however, try to close out infringers or visit unnecessary hardship upon them. Although under no obligation to do so, it adopted the practice of licensing infringers who belatedly recognized its rights, even at the end of litigation, settling questions of damages as appeared fair and equitable, giving them its equipment and its service at its usual terms, and, in the case of many small manufacturers, greatly strengthening their competitive position in the industry by its efficiency studies and engineering advice (Stip., Ex. H-6152, R. XII, 8595; offers of proof, R. VII, 4967, 4969, 4975; R. IX, 6720, 6721-23; etc.).

Lease-licensing policy.

Hartford's licensing policies, thus extended both to infringers and to non-infringers, were originally adopted in 1914 *by Hartford alone* (Ex. H-5347, R. XXV, 15041; R. II, 1406; R. VI, 4333), when Hartford first decided to go into the licensing business—long before Hartford had any business or contract relations with Empire, Corning, Owens or any of the other defendants. We have previously stated

this fact but it merits repetition. These policies were similar in many features to the licenses previously issued by Owens—at a time when Owens was not a manufacturer—to which the industry was already accustomed (R. II, 1407). Hartford believed that these policies were suited to the way in which the industry had naturally developed.

Briefly summarized, Hartford's 1914 licensing policies were to lease its patented machines to glass container manufacturers, upon specified royalty and other terms, usually under 8-year lease contracts which gave the licensees the right to renew their lease contracts for additional periods of 8 years (*e.g.* Ex. 1625, §4, R. XIII, 9386, 9389; Ex. H-5782, §4, R. XIII, 9655, 9658).

Royalties.

One of these Hartford licensing policies, adopted in 1914, was that relating to royalties. The royalty return was fixed upon the theory that Hartford should receive approximately one-third of the savings in labor cost resulting from the use of its machines as against the use of hand feeding (R. II, 1405-6; R. VI, 4338). The Hartford machines actually turned out to be much more efficient than originally expected, and consequently the royalties charged were much less than one-third of the savings.

Moreover these royalties have frequently been reduced (Stip., Ex. 1585, R. XI, 8133-9; Ex. H-5799, R. XXVII, 15451; R. VIII, 5805-10). For the year 1938—the year before this suit was brought—the evidence shows that the feeder royalties had by then been reduced so as to average approximately 4% of the net value of the product of the machines (Ex. 1824-C, R. XXIII, 14354c; R. VII, 5464).

They are even lower today because in September 1941 Hartford reduced its feeder royalties again by approximately 20% (*cf.* Ex. H-5799, R. XXVII, 15451 and Stip.,

Ex. 1585, R. XI, 8133-9). Assuming that selling prices today are roughly the same as selling prices in 1939—the present feeder royalty is about *3.5% of the selling price of the product.*

Counsel for the Government said during the testimony:

> "I didn't say the royalties are high. We never attacked their royalties" (R. VII, 5331).

The Government did attack the profits of the company on the basis of the ratio of net income to invested capital. Obviously that is not a proper basis to compute the income from patented inventions—any more than it would be with respect to income from other products of the mind. An inventor, like an author, is not rewarded on the basis of his "invested capital". That may be practically nothing at all. He is rewarded on the basis of the value of his invention as an improvement over the prior art.

Even on the invested capital basis however, the fact is that profits averaged from the beginning were not unusual. For the first ten years Hartford had nothing but losses (Ex. H-5002, R. XII, 8506). It never declared a dividend on common stock until 1924, and then only a small one (Ex. 395, R. XX, 13003; Ex. H-5011, R. XXIV, 14711-2). The later years eventually wiped out the early losses but over the entire period from 1912 to 1939 Hartford earned, on the average, only 11.3% on its invested capital (Exs. H-5803—H-5803-A, R. XXVII, 15455-6) as compared with 7.8% for ordinary and less hazardous business enterprises (R. VIII, 5896).

It should also be remembered that a patent is a wasting investment because it will eventually expire. Moreover it may become worthless at any time in the event that it is superseded by a better patented invention.

Fields of ware.

As previously stated (*supra,* p. 10), the container industry had naturally evolved in such a manner that manufacturers generally concentrated on the production of one or a few types of container.

In 1914 accordingly, as another of Hartford's original licensing policies—conceived long before the Company had any relations with any other defendants—Hartford decided to recognize this specialization and to grant licenses for the manufacture of the particular types of product in which each licensee was engaged (Exs. H-5346-7, R. XXV, 15034-50; Stip., Ex. H-6152, R. XII, 8571 *et seq.*).

Moreover Hartford, in granting licenses in any particular field, was careful not to issue licenses so indiscriminately that the value of a Hartford license would be cheapened (R. II, 1409-11; R. V, 3403). As will be shown hereafter, the very essence of the patent right consists in the power of the patentee either to keep the patent exclusively to himself, or to grant rights thereunder to others upon a basis which will make the license worth while.

It should be clearly understood, however, that Hartford did in fact issue a considerable number of licenses in all fields of container ware. The figures as to the number of licensees in each field for the year 1939—immediately prior to the time this suit was brought—were as follows (the figures in parentheses indicate additional—qualified—licenses, which in some instances were minor and in other instances involved concerns doing a substantial volume of business) (Ex. H-5750, R. XXVII, 15436):

Type of Ware	Primary Licensees	Additional Licensees	Total Licensees
Prescription and Proprietory..	18	(12)	30
Beverage Pressure	22	(5)	27
Beers	17	(7)	24
Liquors	21	(7)	28
Beverage-Non-Pressure	13	(9)	22
Wines	9	(7)	16
Perfumery and Toilet.....	14	(5)	19
Foods	17	(12)	29
Milks	3	(6)	9
Household Fruit Jars.....	3	(1)	4
Miscellaneous Containers	19	(11)	30

As of October 8, 1940—or shortly thereafter—all limitations as to fields of ware were irrevocably waived by Hartford so that all licensees became entitled to use Hartford's machinery in making any and all types of glassware. (Supplemental answer, R. I, 435-6; pre-trial conferences, R. I, 451-2, 611-2.)

Exclusive licenses.

Another of Hartford's licensing policies was to refrain generally from issuing exclusive licenses (R. II, 1471). Neither Owens nor Hazel received exclusive licenses. Corning received one as a result of the saving and refinancing of Hartford in 1922, but that was in its specialty non-container field in which none of the other Hartford licensees were interested (R. II, 1413; R. VI, 4349-50). That also was terminated—in 1940—before the trial of this suit (Ex. H-5030, R. XIII, 9540).

At the time this suit was brought there were outstanding only a few other exclusive Hartford licenses. Three were very minor and wholly unimportant—one for the manufacture of certain parts of thermos bottles (Ex. 1608, R. XIII, 9336, 9338), and two others for an obsolete type feeder unused for many years (Ex. H-5750, R. XXVII,

15439; R. VI, 4420). These also were terminated in 1940-41 (Ex. H-5032, R. XIII, 9544; Ex. H-5033, R. XIII, 9547; Ex. H-5750, R. XXVII, 15450). The *only* other licenses by which Hartford conferred *any* trace of exclusivity were licenses to Thatcher and to Ball. The facts with respect to these licenses are as follows:

Thatcher Milk Bottle Machine License.

On December 8, 1920, Hartford entered into an exclusive license with Thatcher for the manufacture of milk bottles by a particular machine unit, namely, the paddle-needle feeder together with a type of milk bottle forming machine (Ex. 231, R. XII, 8907). At that time Hartford was in a very serious financial situation and the royalties from this license were very important to it (Stip. Ex. H-5002, R. XII, 8506, 8514).

Shortly thereafter, however, Hartford developed its so-called "single feeder" which far surpassed in performance and efficiency the old paddle-needle feeder under which Thatcher had been licensed (R. VI, 4359-60). A dispute immediately arose between Thatcher and Hartford as to whether Thatcher's exclusive rights applied to the single feeder (R. II, 1029-30). Thatcher was a sound and well-managed licensee. Its license had been of great help to Hartford when help was sorely needed. Hartford was grateful to it and treated its officers with decent and natural consideration. On the other hand, Hartford insisted that Thatcher had never had any exclusive license to use its modern version of the gob feeder machine—the single feeder—and Thatcher finally admitted that Hartford was right (Ex. 237, §3, R. XII, 8930; Ex. 240, §27, R. XII, 8947).

Thatcher's exclusive consequently is of little importance today. It discontinued the use of the paddle-needle feeder many years ago and—while it still utilizes the milk bottle forming machine—its competitors use other more modern machines (R. II, 1453-4; R. VI, 4572; R. VIII, 5640; R. IX,

6801). Prior to this suit Hartford had licensed a number of milk bottle manufacturers to use Hartford's feeders in addition to Thatcher (Ex. H-5750, R. XXVII, 15436). In 1937 there were *ten** milk bottle manufacturers and the percentage of the business done by each was as follows (Complaint, Par. 228, R. I, 66; Hartford Answer, Par. 228, R. I, 427-8).

Thatcher	36.57
Owens	35.08
Liberty	6.17
Seven others	22.18

Of course, since October 8, 1940 all of Hartford's other licensees have also been licensed to use Hartford's single feeder and modern I. S. forming machine for the manufacture of milk bottles (Hartford Supplemental Answer, R. I, 435-43).

The court below r[illegible]erred in its opinion to certain purchases of milk bottle companies by Thatcher. Hartford was not responsible for those purchases and we shall not attempt to discuss them in this brief.

Ball Fruit Jar License.

Ball had been a pioneer in the fruit jar industry and a large producer of fruit jars for half a century. After the Hartford gob feeders went into common use, Ball began to experiment with them and eventually installed feeders that infringed the Hartford patents (R. IX, 6598-6601).

Hartford was naturally interested in securing Ball as a licensee, but Ball refused to accept a license until after Hartford had successfully adjudicated its patents in other cases—and particularly in a case which involved a Miller feeder, containing certain mechanisms substantially the same as those which Ball employed (58 F. (2d) 701; R. IX, 6599-6601).

---

* All but one are Hartford licensees.

Finally, in 1933, Ball conceded infringement and paid $150,000 for past infringement (Ex. 199, R. XII, 8877, 8878). Hartford thereupon reacquired an unused fruit jar license which previously had been issued to the General Glass Corporation and issued a license to Ball (Ex. 198, R. XII, 8876; Ex. 199, R. XII, 8877; R. IV, 3023). Hartford also waived part of its claim for damages arising out of an infringing business of a third party which Ball acquired to operate under its license (R. III, 1537-8). Hartford had other fruit jar licenses outstanding but in its Ball license, known as a "residual" license, agreed that it would grant no additional feeder licenses in this field (Ex. 199, Sched. C and Art. II, §2, R. XII, 8895-7, 8880). Ball Bros.—in addition to agreeing to pay ordinary royalties—paid a further sum of $250,000 for this residual license (*id.*, Art. II, §3, R. XII, 8880-1).

Hazel and Owens were interested in the negotiations with Ball. This was natural because each was then sharing in Hartford's royalties (Ex. 142, R. XII, 8764; Ex. 145, R. XII, 8787). Indeed Ball at one time sought to bring these companies directly into the negotiations, by suggesting that the licenses to Owens and Hazel—permitting them to manufacture fruit jars—be amended to place a limitation upon the quantity of fruit jars thus licensed (R. II, 969; R. III, 2145; R. VI, 4271-2). Counsel however rejected this suggestion and the proposal was dropped (R. II, 1008-10; R. III, 2153-4; R. IV, 2422, 2437-8, 2441, 3044, 3074; R. V, 3381-2; R. VI, 4051-4, 4079, 4268, 4271-2).

It was found below with respect to this proposal of Ball that although the idea of a written agreement limiting the production of fruit jars by Owens and Hazel-Atlas was abandoned, there was nevertheless an oral understanding to the same effect. The parties, however, flatly denied upon the stand that there was any such oral understanding (*id.*).

The fact that Owens and Hazel-Atlas did not, except in one year, exceed the production suggested by Ball as an agreed maximum for these licensees, is entirely without significance. The maximum suggested by Ball was based upon production in years preceding the 1933 license agreement (R. II, 994-5; R. III, 2152; R. IV, 2438-9; R. VI, 4021). Subsequent to the 1933 agreement, however, the demand for fruit jars decreased because of changes in national habits (Ex. 947, R. XXI, 13593; R. III, 2156), with the result that total sales of the country—including the sales of Owens and Hazel-Atlas—fell to substantially lower levels than in previous years. Neither Ball nor anyone else sold as much as in previous years because the demand did not exist (Ex. 947, R. XXI, 13593; R. III, 2156; R. IV, 2546; R. VI, 4270).

In any event, the matter is highly academic. Ball's license was modified by an amendment dated August 1, 1940 to remove the "residual" provision—in consideration for the payment to Ball of $425,000 (Ex. H-5026, §2, R. XIII, 9528). And every one of Hartford's 41 licensees has been perfectly free to use the Hartford machinery to make all the fruit jars it wants since October 8, 1940.

The Industry Today.

The glass container industry at the time of the instant suit—by reason of the Hartford policies above discussed—was widely licensed to use the efficient Hartford gob feeding system.

The industry, moreover, by recognized economic standards, was unquestionably one of the most healthy and progressive industries of the country.

Number of licensees.

The large number of manufacturers which Hartford has licensed to make glass containers demonstrates con-

vincingly the existence of healthy competition within the industry.

In each field of container ware Hartford had licensed, at the time of this suit and for many years previously, numerous competing manufacturers. See the table of licensees herein at page 57, *supra*.

It is true that Hartford had tended to be selective in the issuance of licenses—it had sought to license strong companies; to avoid furthering promotion schemes; and to prevent the value of its licenses from being cheapened by the issuance of too many licenses (R. II, 1409-11, 1300, 1470-1; R. V, 3402-3).

There are sound business reasons in favor of such a policy—and that is the policy which most patentees would naturally pursue. The very essence of the patent right is that it gives the patent owner rights which are exclusive—rights which he can extend to others or not, as he sees fit. To license indiscriminately would be to impair the value of the patent—to destroy the very reward which the patent owner is entitled to receive.

However, Hartford did eventually license practically every one in the container business—41 container manufacturers being licensed at the time of this suit (Ex. H-5750, R. XXVII, 15436-50).

In fact Hartford issued so many licenses that there has always been chronic overcapacity in the industry (Exs. GCA-6082-3, R. XXVIII, 16242A, 16243; R. V, 3397, 3477; R. IX, 6619-22). Thus in 1928 total industry shipments were only 58.9% of total active industry capacity to produce—which means that the industry could have produced 69.8% more had there been the demand. Again, in 1939, shipments were 63.8% of actual capacity—which means that the industry could have produced 56.7% more than it actually did produce (*id*).

On certain occasions Hartford was criticized below, because it had consulted with the individual licensees from time to time when it was contemplating licensing new manufacturers (R. II, 1251 *et seq.*; R. V., 3234-8). It would be quite unrealistic to think that business could be carried on in any other way.

Hartford also consulted other sources of information —and the fact still remains that on the basis of advice and information thus collected Hartford finally made its own decisions as to whether it would or would not extend the contemplated licenses (R. II, 1261; R. V., 3235).

The only situation in which Hartford had any obligation to consult another licensee, in order to get his *consent* to the issuance of a new license, was that arising under the Hartford-Owens 1924 settlement agreement. Thereunder Hartford was required to get Owens' consent to the issue by Hartford of new licenses under *Owens* blocking patents (Ex. 55, §22, R. XII, 8640-1). The various features of the 1924 agreement, however, were cancelled during 1931-1935 and replaced by a non-exclusive license under which Hartford was free to license without any consultation whatever with Owens (Ex. 411, R. XII, 9102; Ex. 145, §5, R. XII, 8792). Thereafter Hartford acted independently of Owens.

Business done by licensees.

The many glass container manufacturers thus licensed by Hartford have varied considerably in size. Generally speaking, however, they have not been large—except for Owens and Hazel-Atlas, which were large companies long before Hartford commenced licensing (as to Hazel, R. III, 2325-6; as to Owens, Ex. O-6012, R. XXVIII, 16118-21; R. VIII, 6283).

The great majority of companies in the industry have been and are small licensees who depend upon Hartford for research, advice on technical, engineering and manufacturing problems, and promotion of the glass container business generally. The proportion of the business done in 1939 by the companies primarily engaged in the container industry is shown by the following table (Ex. GCA-6090, R. XXVIII, 16250; Ex. GCA-6088, R. XXVIII, 16248; Ex. GCA-6085-6, R. XXVIII, 16245-6):

% of Business:	
Owens	34.97%
Hazel-Atlas	16.03
Anchor Hocking	7.25
Knox	6.36
Thatcher	3.40
Ball	3.33
Armstrong	3.16
27 others	25.50*

In addition, seven other manufacturers—not primarily engaged in container manufacture—did a small volume of container business.

Competition between licensees.

Competition between these various licensees, as summarized in the above tabulation, has been keen.

One factor in bringing about this competitive situation has been Hartford's licensing of so many manufacturers —free of price restrictions (See *e.g.* R. IX, 6719, 6725) and with chronic overcapacity. These manufacturers during 1929-1939 alone (long after the price decreases attributed to the substitution of machine feeding for hand feeding) have reduced prices by 25.2% (Ex. H-5825-6, R. XXVII, 15477-8)—a decrease substantially in excess of the decrease in general price levels (*id.*), despite attendant

* Three of these were non-licensees doing 2.6% of the business.

increases in labor and material costs during the latter part of that period.

Another factor has been Hartford's research and service assistance to the small manufacturers—of invaluable aid in their competitive struggle with the large manufacturers (Stip., Ex. H-6152, R. XII, 8571, 8595; Offers, R. VII, 4975; R. IX, 6722, 6727). Whereas total industry sales have increased 54.55% during 1928-1939, the sales of small companies (producing less than 200,000 gross per annum in 1928) have increased 140.79% (Exs. GCA-6084-6, R. XXVIII, 16244-6, note particularly 16246).

The Government has expressly stipulated that Hartford's licensing service has reduced costs—improved quality—increased production and stimulated and increased competition among its licensees (Stips., R. VII, 5329; Ex. H-6152, R. XII, 8595).

The Government did argue that Hartford, through an alleged power to increase royalties, revoke licenses and repossess licensed machinery, had sought to restrain competition on the part of its licensees. The complete answer to this charge is that Hartford licensed and leased its machines for 8-year periods, with automatic renewal privileges of an additional 8 years, and with stated royalties which Hartford could not raise (*e.g.* Ex. 1625, §4 and Sched. D, R. XIII, 9389, 9403-4). Hartford could not have increased royalties, revoked its licenses or retaken its machinery during this aggregate 16-year period—for the reasons charged by the Government—even if it had wanted to.

Effects of Hartford licensing.

The District Court below sweepingly rejected as irrelevant these considerations demonstrating the beneficial effects of Hartford's activities—and the health of the container industry generally. We believe, however, that in cases arising under the anti-trust laws, where the questions

after all are primarily economic in character, such business indicia may properly be considered by the court.

Like the "lapse of time", such factors may at least "determine against particular remedies."*

Hartford's licensing has unquestionably been beneficial to the industry, and the following among other indicia—in part mentioned above—clearly demonstrate this:

Constantly improving machinery—
Hartford in 1939 was spending at the rate of approximately $1,200,000 per year in research and service (Stip., Ex. H-6152, R. XII, 8595).

Present machinery best in world—
The Hartford automatic system is conceded to be the best in the world (Stip. R. VI, 4467).

Increasing output—
Industry production has increased 54.55% between 1928 and 1939 (Ex. GCA-6091-2, R. XXVIII, 16251-2).

Adequate capacity—
Industry capacity averaged 68.6% in excess of demand during 1928-1939 (Ex. GCA 6082-3, R. XXVIII, 16242A, 16243).

Decreasing rate of royalties—
Previous reductions had brought average feeder royalties down to 4.4% on net sales price in 1939; subsequent reductions to approximately 3.5% at present time (Ex. 1824C, R. XXIII, 14354C; R. VII, 5464; Ex. H-5799, R. XXVII, 15451).

Decreasing prices of glassware—
Prices had decreased 25.2% between 1929 and 1939 (Ex. H-5825, R. XXVII, 15477).

Decreasing costs and improving quality—
Hartford research and service are conceded to have resulted in increased production, improved quality

---

* *U. S.* v. *United Shoe Machinery Co.*, 247 U. S. 32, 46.

and reduced costs (Stip., R. VII, 5329; Stip., Ex. H-6152, R. XII, 8595).

Greater growth of small producers—

Total industry sales of glass containers have increased 54.55% between 1928 and 1939, whereas small company sales have increased 140.79% (Exs. GCA-6084-6, R. XXVIII, 16244-6).

Increasing competition—

Hartford research and service are conceded to have stimulated and increased competition amongst licensees, and between licensees and manufacturers of containers of other material (Stip., Ex. H-6152, R. XII, 8595).

Hartford at the time of trial.

To summarize, today more than ever before Hartford is playing a constructive and most essential role in the glass container industry.

The primary function of Hartford continues to be that of furnishing research and engineering service to the industry. It maintains a research and service staff of two hundred engineers and employees—comprising roughly half of its total personnel—and it is recognized as one of the outstanding creative industrial forces in the country. It is continuously developing, perfecting and servicing improved machinery and processes for the manufacture of glass containers (Stip., R. VII, 5326; Stip., Ex. H-6152, R. XII, 8593-5).

This research and service is made possible by the receipt of royalties from Hartford licensees (Ex. H-5011, R. XXIV, 14711-3; Stip., Ex. H-5002, R. XII, 8539-42).

The small container manufacturers—in particular—rely upon Hartford for assistance in their competitive struggle for existence—because unlike the large manufacturers they are not able to afford adequate research facilities of their

own.* At the present time Hartford's staff is working on major research problems to promote the substitution of glass containers for tin and rubber in the packing of foods to release these strategic materials for war purposes. If even 10% of the foods formerly packed in tin should continue to be packed in glass after the war by reason of this research, that alone would result in an increase in the glass container business of over $27,000,000 per year (Smith affidavit, R. X, 7584-5).

Hartford is also working on tempered glass and new machinery which it is expected will still further decrease the weight of glass containers—for instance, milk bottles to less than half their ordinary weight,—and thereby decrease their cost (Smith affidavit, R. X, 7585; see R. VI, 4571-2).

The importance of Hartford's contributions is recognized by the industry. So fearful were they of a suggestion that Hartford be dissolved that a body of small manufacturers—though not joined as defendants—petitioned to be heard in the court below to be sure that no decree would endanger Hartford's continued research and service (R. IX, 6914-6). This petition was denied (R. IX, 6917).

The Government itself conceded that Hartford—in some form, with certain suggested revisions—should be continued for the industry's best interests:

> "Obviously the industry is going to continue to go on, and we hope it will continue to be served by an efficient servicing company; that there will be efficient machines put out. Obviously, the business that is now the Hartford Company, whether it continues as the Hartford Company or in some other form, is the one best fitted to do this. It is the going business which should do this" (Fol. 12639).

---

* R. IX, 6915-6. Hartford offered evidence of 20 of its small licensees to this effect, but such evidence was excluded (Offers, R. VII, 4967, 4975; R. IX, 6720-2, 6727, and 18 others not printed.)

Licenses at the time of trial.

Indeed, most of the argument in this case—both as to the existence of restraints of trade and as to the appropriate remedy—has revolved around situations which had ceased to exist many years before this suit was brought. The 1924 Owens settlement agreement, for example, is vigorously attacked, although it was completely cancelled during the period 1931-1935 and replaced by a simple non-exclusive license agreement (Exs. 568, 569, R. XII, 9109, 9113).

Furthermore, as a result of pre-trial conferences, even Hartford's limited licensing policies above discussed were waived or revised as of October, 1940, or shortly thereafter —and before any testimony was taken in this case. This came about as follows:

At the outset of the trial, an effort was made by the defendants to dispose of the case by consent decree. They did this not because they conceded illegality but because, as stated frankly by counsel for Hartford in open court, "a poor settlement is better than a good law suit" (R. I, 610).

The Department of Justice, at the defendants' request for an itemization of what was deemed wrong in Hartford's licensing, submitted a summary entitled "Hartford-Empire Company Practices Complained of" (Ex. H-6113, R. XXVIII, 16256-61; see R. IX, 6695), and this was made the basis of the settlement discussion. The Government requirements in certain other respects were such that the negotiations were unsuccessful (R. I, 627). However, in an attempt to remove any ground for criticism with respect to limited licenses, the Hartford-Empire Company took steps by waiver—succeeded by formal amendment—to remove license limitations objected to by the Department of Justice (R. I, 602 *et seq.*). This was done—not secretly but openly

—after discussion with the Department of Justice and announcement of the general intention in open court (R. I, 611 *et seq.*).

When Hartford initially offered to discontinue limited licensing, counsel for the Government stated:

> "Your Honor, first of all, I want to make clear that the concessions made by counsel for the defendants are, in our minds, something to be commended. The fact that they are willing to give up a number of these restrictions without trying the case to us is laudatory. On the other hand I must point out unless there is a decree enjoining the practices which they give up * * * the purpose of this suit has not been served" (R. I, 606).

Counsel for Hartford thereafter formally notified the court that Hartford intended to stop this practice—even though the suit was not thereby terminated. Hartford's proposed action was embodied in a written memorandum which was submitted to the court with the following statement:

> "When we were here I believe it was September 6 —I am not just sure—I said to your Honor at that time there were some things we proposed to do, *regardless of any action by the government, which might affect the conduct of the case.* I come now to that point. I have a statement here, of which I will give your Honor a copy in a moment or two, also counsel for the government, which covers those matters" (R. I, 610).

Hartford specifically described its memorandum—thus submitted—as follows:

> "This memorandum is a summary of the steps which Hartford-Empire Company has offered to take on the condition of a complete disposition of the case by consent decree prior to the taking of testi-

mony, as stated in the pre-trial conference of September 20, *and which Hartford-Empire now proposes to take, regardless of the disposition of the case*" (R. I, 611).

A supplemental answer and an affidavit were thereafter filed on or about October 18, 1940, stating that these license restrictions had been removed and attaching a copy of a letter of waiver which Hartford had sent out to all its licensees under date of October 8, 1940 (R. I, 435, 441-3).*

In order to permit Hartford to extend licenses to all its licensees in all fields, as above described, it was of course necessary to cancel certain exclusive licenses previously referred to. These agreements were cancelled at or about the time Hartford removed the restrictions in its licenses generally, but were not specifically covered by the memorandum and discussion referred to above. The 1916 and 1922 agreements with Corning and Empire were cancelled as of September 23, 1940 (Ex. H-5030, R. XIII, 9540) and the 1933 "residual" license to Ball was cancelled at about the same time (Ex. H-5026, §2, R. XIII, 9528). Though these cancellations were entered into after some discussion in court and with Government counsel—it is not suggested that they were submitted in advance to either for approval. They were made without awaiting any settle-

* The letter of October 8, 1940, was effective as a waiver even without the subsequent formal amendments of the license agreements which were executed by most licensees. *Cf. General Talking Pictures Corp.* v. *American Telephone & Telegraph Co.*, 18 F. Supp. 650, 664, 667 (D. Del.). The Government sought, in argument below, to minimize the effect of this letter. But Hartford's letter to its licensees was understood, at the time, to be an irrevocable waiver. It was so understood by Hartford and so treated by it in its supplemental answer, at the trial and in oral argument (R. I, 435-6, 643; R. II, 1472; R. V, 3623-4). It was so understood by Hartford's licensees, who in some cases even without executing formal modifications of their licenses acted upon the waiver by operating in formerly unlicensed fields (R. VII, 5470; R. IX, 6729).

ment—but for the purpose of *pro tanto* meeting the Government's demands. These cancellations were reported to the court in the supplemental answer filed by Hartford October 18, 1940—though details such as the considerations paid to Corning and Ball were not there set forth.

The situation as to the Hartford licenses—devoid of limitations—was accordingly as follows at the time the case was tried:

(1) Owens—a *non-exclusive* licensee—pays standard royalties—extends a non-exclusive license to Hartford—but shares no Hartford royalties.

(2) Hazel—a *non-exclusive* licensee—pays standard royalties—extends a non-exclusive license to Hartford—and receives one-third of Hartford royalties therefor after deducting the first $850,000 going exclusively to Hartford.

(3) Corning—a *non-exclusive* licensee—pays standard royalties—the cross-licenses of 1916 and 1922 having been cancelled, even though relating to the separate specialty non-container industry.

(4) Ball—a *non-exclusive* licensee—pays standard royalties—the "residual" fruit jar license having been terminated.

(5) Thatcher—a *non-exclusive* licensee—pays standard royalties—retaining only an exclusive on an old-fashioned type of milk bottle forming machine which is inferior to the modern types available to others.

(6) Lynch—a *non-exclusive* licensee on forming machines—pays nominal royalties.

(7) 36 other licensees—all *non-exclusive.*

(8) All limitations as to fields, quantity to be produced, etc., waived in all licenses.

As the result of the foregoing, there were 41 feeder licensees (not including additional licenses to subsidiaries

of the same companies) who were in the possession of Hartford machines and had unlimited licenses to manufacture any kind of glassware.

All exclusive licenses have been cancelled with the sole exception of the Thatcher license on the old-fashioned milk bottle forming machine—which, as previously stated, is *de minimis*.

As a part of this program of removing any possible complaint, Hartford also announced that it would uniformly license all applicants primarily engaged in glassware manufacture, including newcomers, who were financially responsible and who might reasonably be expected to continue in the business (R. I, 442-3).

The situation was aptly expressed by counsel for the Government during the trial when he said:

> "Of course since October 7, 1940, the fields have been thrown wide open" (Fol. 3695).

The Present Case.

Hartford has been in existence for more than thirty years. Most of the transactions complained of in this case occurred many years ago. The most recent transactions of any importance complained of took place in 1932 and 1933.

Events preceding suit.

In 1935 the Department of Justice investigated Hartford's contract and licensing structure, examining it in detail with Hartford's willing assistance and cooperation. This examination covered all the principal licensing agreements now in question (R. VI, 4176, 4230). At the conclusion of the examination the President of Hartford wrote to Mr. John Dickinson, then in charge of anti-trust matters at the Department of Justice, saying, with respect to a per-

sonal interview with Mr. Dickinson (Ex. H-5021, R. XXIV, 14723):

> "It was our • • • understanding that if you should reach a conclusion that we were not fully obeying the anti-trust laws you would so notify us so that we might first discuss this matter with you in Washington before you took any legal action."

No reply and no criticism of Hartford's affairs were received.

In 1938 the T.N.E.C. investigators made still another investigation of Hartford's contracts and affairs. Hartford again cooperated fully and its officers testified orally at the Committee hearing (Hearings Before the T.N.E.C. (1939), Part 2, p. 665). Though some matters were criticized on grounds of economic policy, the T.N.E.C. did not suggest to Hartford, even after this exhaustive and critical examination, that its licenses were illegal, either separately or as a whole. On the contrary, in its report of July 17, 1939 the T.N.E.C. stated:

> "The evidence showed that control of patents in two companies—The Hartford Empire Co. and The Owens-Illinois Glass Co.—allowed them *legally* to dominate the industry" (p. 7).

In July, 1939, however, the Department of Justice proposed and the T.N.E.C. adopted very elaborate and revolutionary recommendations to Congress for changes in the patent and anti-trust laws. These suggestions, as subsequently elaborated in 1941, called for (1) sweeping compulsory licensing, (2) the prohibition of all limited licenses *per se*, and (3) the forfeiture of patents for violation of the anti-trust laws (T.N.E.C. Preliminary Report July 17, 1939, Sen. Doc. No. 95 of the 76th Cong., 1st Sess., pp. 16-18, and Final Report March 31, 1941, Sen. Doc. No. 35 of the 77th Cong., 1st Sess., pp. 36-37).

It was implicit in these reports that its recommendations were not existing law—that they would require legislative action—not judicial action.

In August, 1939, Congress enacted into law five bills incorporating certain other T.N.E.C. patent recommendations relating to Patent Office procedure (Public Acts 286, 287, 288, 341 and 358, approved August 5-7, 1939) but enacted no bills incorporating the above described revolutionary patent and anti-trust suggestions.

Thereafter, in December, 1939, the Department of Justice announced that it had decided to bring the instant case against the glass container industry as a test case for the future guidance of the Government and business (See D. of J. Release, Dec. 11, 1939, C.C.H. Trade Reg. Ser. (8th Ed.) Par. 17,035. See particularly p. 23,357).

Finally, in October, 1942, a judgment incorporating substantially the T.N.E.C. recommendations was entered in this case (R. X, 7653 *et seq.*).

Nature of judgment.

The similarity between the judgment in this case and the T.N.E.C. recommendations is striking. For example, Section 29(a)(1) of the Judgment, prohibiting limited licenses *per se*—and not as part of any alleged illegal conspiracy—follows closely the T.N.E.C. recommendations (R. X, 7672). Again, the provisions in Section 24 of the judgment as to royalty-free licenses on existing patents and compulsory licenses on future patents not only embody the T.N.E.C. recommendations but go far beyond them (R. X, 7667-8).

As previously stated, the T.N.E.C. recommendations were suggestions for legislative changes by Congress—and Congress had answered these recommendations by enacting other T.N.E.C. patent recommendations but not these.

Indeed Congress had in the past repeatedly declined to act on similar recommendations (see pp. 125 and 158, *infra*). Small manufacturers in particular, before Congressional hearings and otherwise, had strenuously opposed such legislative proposals.

Moreover, every industry witness who was interrogated before the T.N.E.C. concerning its recommendations had strongly disapproved of the same.

In fact, the very Commission appointed by President Roosevelt for the purpose of studying these questions has only recently rendered its report specifically disapproving the recommendations of the T.N.E.C. (See House Doc. No. 239, 78th Cong., 1st Sess.) as follows:

> "During the course of its investigation the Commission received and gave serious study to many suggestions and proposals for reforming the patent system which have not been made the subject of recommendation for one or more of the following reasons:
>
> "(1) The proposed reforms would not be a beneficial innovation in our patent system. Examples of such proposals are a broad *compulsory licensing system, outlawing certain limitations in patent licenses,* major and minor patents, patents for different terms of years, and opposition proceedings" (p. 9).
>
> "After a study of the needs in this country and the effects in foreign countries of a *compulsory licensing system,* the Commission has reached the conclusion that it would not be advantageous to incorporate such a general system in our patent laws" (p. 3).

As to the value of our existing patent system generally, which authorizes the limited licenses and similar practices condemned by the court below, the following findings of the

Commission are appropriate and relevant to the issues now before this Court:

> "The American people and their Government should recognize the fundamental rightness and fairness of protecting the creations of its inventors by the patent grant. The basic principles of the present system should be preserved. The system has contributed to the growth and greatness of our Nation; it has—
>
> (1) Encouraged and rewarded inventiveness and creativeness, producing new products and processes which have placed the United States far ahead of other countries in the field of scientific and technological endeavor;
>
> (2) Stimulated American inventors to originate a major portion of the important industrial and basic inventions of the past 150 years;
>
> (3) Facilitated the rapid development and general application of new discoveries in the United States to an extent exceeding that of any other country;
>
> (4) Contributed to the achievement of the highest standard of living that any nation has ever enjoyed;
>
> (5) Stimulated creation and development of products and processes necessary to arm the Nation and to wage successful war;
>
> (6) Contributed to the improvement of the public health and the public safety; and
>
> (7) Operated to protect the individual and small business concerns during the formative period of a new enterprise.
>
> The *strongest industrial nations have the most effective patent systems* and after a careful study, the Commission has reached the conclusion that *the American system is the best in the world.*"

Specification of Errors.

The basic issues of this test case, presented for decision by the above-described Hartford patent settlements and licenses, have been summarized at pages 4-5 of this brief.

The District Court decided these issues and entered judgment in favor of the Government.

The opinion, findings of fact, conclusions of law and judgment of the District Court are of great length and cover many printed pages of the record. Accordingly a summary of these documents here is impractical. Their nature, however, is set forth in the discussion herein.

Hartford and its associated individual defendants filed assignments of error to the action taken by the District Court (R. X, 7708-44). For a detailed itemization of the errors complained of this Court is respectfully referred to these Hartford assignments. The fundamental errors therein assigned are fully developed in the argument which follows.

Argument.

Importance of the case.

This is a test case of great general importance. It involves very serious questions of public policy under the patent and anti-trust laws. The principles which this Court lays down in this case are certain to have a profound and far-reaching effect upon the industrial system of the country.

We are in a very advanced stage of industrial development. New inventions are no longer simple and complete in themselves—but often, as here, relate to very complex machines. These machines comprise a large number of

parts—each having a separate function but all working interdependently as one organic whole. These parts are often covered by wholly separate patents. These patents are very seldom the contribution of a single man or a single company.

Progress under modern conditions depends upon patient and expensive research. Research in turn depends upon incentive. The incentive to research, finally, is derived from the patent law, and under the patent law there must be some way of dealing practically with those situations in which it becomes necessary to combine the supplementary inventions of different men.

Take the sewing machine, for example. It is an historic fact that Howe invented the needle with the eye in the point. But that was of little use until Singer developed the gadget that moves the cloth under the needle after each stitch. These two separate and independent patented inventions were combined to make the modern sewing machine. That machine undoubtedly achieved "dominance". Under the judgment below—that combination would have been illegal.

Again, Bell made certain basic inventions with respect to the telephone. Others—Edison, Blake and Berliner—invented further improvements. The Bell Telephone Company acquired these supplemental and improvement patents. It was the combination of these inventions that made possible the instrument in commercial use today. That combination unquestionably achieved "dominance". Was that unlawful? This Court did not think so in *United States v. American Bell Telephone Company*, 167 U. S. 224, 249.

These simple instances are typical. They are duplicated constantly in the technology of modern industry.

They were reduplicated—in a very complex manner—in the case at bar and every effort the defendants made to

solve the patent conflicts was condemned by the court below.

The primary question in this case—and the one which we most earnestly desire to draw to the attention of the Court—is the problem of how these patent conflicts may be solved.

If progress is to continue it is necessary that the resolution of such conflicts be governed by rules—

(1) that are practicable;

(2) that are flexible enough to permit adjustment to varying situations;

(3) that will not, on the one hand, prohibit the interchange of the results of research—or, on the other hand, permit such interchange only at the cost of relinquishing the patent protection which is the incentive offered by the patent law;

(4) that will not prescribe such devastating penalties for error that every research organization in the country will be in peril of having all its contributions swept away—and patent owners henceforward will be too terrorized to cooperate at all.

Such rules should not be so shifting and uncertain that they are incapable of comprehension by practical men. Nor should the penalties for error be so drastic that research organizations henceforward will not dare to give licenses or to accept licenses from others. Nor should such mutual accommodation be conditioned upon the relinquishment of those exclusive rights which constitute the reward held out to the inventor and for the protection of which—as Chief Justice Marshall has appropriately said—"The public faith is pledged."

Precedent established by the case.

The instant case graphically illustrates the above described problems of modern industrial research and poses the question of how these problems may be solved.

Hartford, it will be recalled, invented the gob feeding system of automatic glass machinery. Others made certain fragmentary, supplemental inventions, but none had been able to conceive or construct a practical gob feeder until Hartford did so. This feeder was a great advance in the art and Hartford applied for patents on its inventions.

Thereupon there developed one of the most complex and exasperating patent conflicts in the history of the patent law. Hartford was confronted by patents on fragmentary contributions by others which blocked the use of its inventions. Its applications for patents were tied up by interminable interference proceedings within the Patent Office. Hartford and its licensees were harassed by infringement litigation in the courts.

This situation continued for many years. Finally Hartford settled with the owners of the various conflicting, supplemental applications and patent rights. These settlements have already been described in the factual statement.

Years later the Department of Justice brought suit against Hartford. The news release at the commencement of the suit, as previously stated, announced that it was intended as a test case to serve as a guide for businessmen and for the Department.

The court below decided against the defendants' solution of the patent deadlock, and thereupon rendered a long and very complex judgment, covering 40 pages of the printed record. This judgment constitutes an elaborate

code of legislation under which these defendants and each of them are required to operate—not merely during the continuance of any alleged illegal combination—but in perpetuity.

This judgment will be analyzed in detail later but in substance it held, with respect to this settlement of patent deadlocks and the patent licenses relating thereto, that (R. X, 7653 *et seq.*):

1. Each and every one of the settlements which Hartford entered into was illegal.

2. All licenses between Hartford and the other defendants or between Hartford and its licensees—even though non-exclusive and free from limitations—are cancelled.

3. All existing glass machinery patents are forfeited—both patents of Hartford and patents of the other defendants.

4. All future glass machinery patents must be compulsorily licensed to all applicants on identical terms at reasonable royalties to be fixed by the court.

5. Licenses under glass machinery patents which contain limitations as to place, quantity, character of product, etc., are forever prohibited.

6. Leases of machinery of any type whatever are forever prohibited.

7. Every article sold by any defendant—whether machinery or glass or any other article whatsoever—which embodies an invention covered by a patent—must be sold at equal prices and terms without any limitations or exceptions.

Future action—in ways too numerous to mention here—is dependent on submission to and consent of the District

Court and the parties are subjected to perpetual surveillance.

It is difficult to ascertain from the opinion, which accompanied the judgment, the exact theory on which the court proceeded in handing down a decree of this severe and confiscatory character.

But as a "guide" to businessmen, the opinion and judgment—when interpreted as one document—seem to suggest the following:

(1) If two inventors are in a position where they have supplementary (not competing) inventions—which block each other, so that each has a fragment of a great improvement but neither can move without using the other's invention in conjunction with his own—then any arrangement permitting one inventor to use the patents of another is illegal where the result, foreseen and intended, will be "dominance".

(2) "Dominance" will always be intended and achieved by any combination of independently owned, supplementary, non-competing inventions which produces a new machine so much better than existing machines that the public will prefer to use the new and more efficient machines—because the patents on the new machine will be combined and the public will be permitted to use the machine only on terms specified by the patent owners.

(3) In such a case one patent owner cannot buy the other's patent.

(4) The two patent owners cannot exchange exclusive licenses.

(5) They cannot even exchange non-exclusive licenses—if by doing so they would be able to produce something really superior and thereby achieve "dominance".

(6) Finally, they cannot even settle interference proceedings in the Patent Office or infringement litigation in the courts. All such proceedings must be fought out to the bitter end to the courts of last resort.

Moreover, if anyone is found to be moved by the intention of making and obtaining patent control of something really better than anything that has heretofore existed—i. e., to "achieve dominance"—apparently then

Everything else that he may do in connection with his business—no matter how normal and innocent it may be *per se*—at once becomes unlawful as part of a "plan to achieve dominance".

All existing patents are forfeited and become community property.

Anything that he may invent for the rest of his life becomes subject to public utility obligations.

Indeed, the logic of the Government's position below, with respect to settlements, would have compelled the defendants to fight every interference—every question of infringement, validity and scope, to the courts of last resort.

Anyone who knows the inexhaustible possibilities of patent litigation* knows what that would have meant.

After great expense, great delay and innumerable lawsuits, it might have been possible to obtain adjudications

---

* A good illustration is the celebrated series of cases involving the patents of Armstrong and DeForest.—*Armstrong* v. *DeForest Radio Tel. & Tel. Co.*, 279 Fed. 445 (S. D. N. Y.), affirmed 280 Fed. 584 (C. C. A. 2nd), certiorari denied 270 U. S. 663; *DeForest* v. *Meissner*, 298 Fed. 1006; *DeForest Radio Tel. & Tel. Co.* v. *Westinghouse Elec. & Mfg. Co.*, 13 F. (2d) 1014 (E. D. Pa.); *United States* v. *DeForest Radio Tel. & Tel. Co.*, 18 F. (2d) 338 (Del.), and *Langmuir, et al.* v. *DeForest, et al.*, 18 F. (2d) 345 (Del.), affirmed, *Westinghouse Electric & Mfg. Co.* v. *DeForest Radio T. & T. Co.*, 21 F. (2d) 918 (C. C. A. 3rd), affirmed 278 U. S. 562; *Radio Corp.* v. *Radio Engineering Laboratories*, 1 F. Supp. 65 (E. D. N. Y.), affirmed 66 F. (2d) 768 (C. C. A. 2nd), affirmed 293 U. S. 1.

upon the questions of priority, validity and scope as to each of the numerous patents here involved.

Meanwhile, the whole patent situation would have been atomized. A considerable number of fragmentary patent positions would have been established in the hands of different persons—each of whom, like a dog in the manger, could have prevented anyone else from making the most efficient gob feeder—while Hartford could have prevented anyone else from making any gob feeder at all.

Hartford and all the other patent owners would have bankrupted themselves in litigation. Neither Hartford nor any other machinery manufacturer could have built—much less improved or perfected—the modern gob feeders.

No glass manufacturer could have safely used one—even if he could have gotten one of the bootleg variety. Sooner or later the glass manufacturer would have found himself the center of a group of claimants, each asking a separate royalty or separate damages for infringement. He would not have had the technical knowledge to protect himself. The inevitable result would have been delay in the progress of the art and infinite vexation, exasperation and anxiety.

Who would have benefited from that? Not the "small" glass manufacturer or the "new" glass manufacturer—but Owens and Hazel (who already had and could safely use the suction machines)—and possibly some of the other large glass manufacturers who might, at least for a time, have stood off the patent owners and exploited their patents without paying therefor.

We do not think such a situation represents sound public policy.

Nor do we think it represents the law. As this Court has said in other cases, we believe that an effort after efficiency is not condemned by the statute.

Discussion herein of the case.

We turn now to a more detailed analysis of this case, but in so doing we wish to point out that—by reason of the national importance of this proceeding—we shall not attempt in discussing the basic issues herein raised to treat in addition all of the interminable correspondence and agreements in the record. We are informed by the Government that this is a test case, and accordingly we believe that it should be decided upon broad and general principles—based upon what was actually done. Certainly any meticulous discussion of innumerable letters written many years apart by persons—some long dead—having varying degrees of authority and often no authority, relating in many cases to suggestions which were never carried out, would only confuse the basic issues of the case.

As we have shown, there is an inescapable necessity under modern technological conditions for finding means by which supplemental inventions may properly be coordinated without sacrificing that exclusive quality which is the basis of the patent law and the incentive to research.

If the right to make reasonable settlements of patent controversies and to interchange rights under noncompeting inventions is to be dependent upon considerations so uncertain and so shifting as the miscellaneous correspondence in this case—then no rule is laid down under which any business man can live and act. And this is particularly so where, under the judgment below, the penalty for error is so devastating.

The inescapable result of a vague and shifting rule based upon what miscellaneous people have proposed, conjectured and debated rather than what they actually did—and which penalizes with patent confiscation any error in applying such rule—would be so to confuse and terrorize inventors and business men that they would not dare either

to give or to receive patent licenses. More than that, it would unquestionably hamper, delay and in many cases completely block the utilization of new inventions. Indeed, to a very real degree it would destroy the incentive to invention and improvement which has been the outstanding characteristic of American industry heretofore.

Denial of any conspiracy.

Our legal analysis of this case—when stripped of these various non-essential details—is that such position as Hartford has in the container industry flows primarily from its own inventions. Secondarily, Hartford's position flows from the acquisition of supplementary patents and patent rights through the settlement agreements which have been set forth in the factual statement above.

There were several of these settlements, and each settlement and the licenses resulting therefrom involved two or more parties.

We shall show that these settlements had justifiable incentives and constituted reasonable and lawful acts as between the parties in question. Accordingly, if Hartford and the other parties had a right to settle their controversies, their action in doing so did not become an unlawful conspiracy because it involved dealings with the other defendants. Settlements cannot be made illegal by the mere application of the epithet "conspiracy".

We shall likewise show that, as a result of these settlements, Hartford was able lawfully to perfect its system of machinery and to distribute it pursuant to license agreements without danger to itself and to its licensees. The machines which it distributed are freely conceded by the Government to be the best in the world for the purposes for which they are designed. In that sense Hartford achieved dominance. Indeed Hartford no doubt expected to. Again,

however, the dominance thus achieved did not render the settlements or the licenses unlawful—or convert them into a "conspiracy" in the legal sense.

We submit that any attempt by the mere accumulation of the number of parties with whom Hartford had agreements and the number of ordinary business contacts between Hartford and its licensees—plus Hartford's alleged dominance—to build up a picture of some intangible conspiracy—as herein charged by the Government—is a complete distortion of the facts. The steps which Hartford took in its exercise of its rights under the patents were taken for what seemed to it sound business reasons and not as the result of or part of a conspiracy. Whatever dominance Hartford has enjoyed flowed properly from the merits of its patented inventions.

In support of this analysis of the instant case we will more specifically urge herein—in treating the four basic issues of this case outlined previously at pages 4-5, *supra*—that:

> I. The acquisition by Hartford of non-competing supplementary and improvement patent rights was lawful.
>
> II. The acquisition by Hartford of non-competing supplementary and improvement patent rights was not rendered unlawful because the result, foreseen and intended, was to achieve temporary dominance.
>
> III. The exercise by Hartford of its patent rights through limited licenses was lawful.

In conclusion, we shall argue that in any event the relief accorded herein is inappropriate because:

> IV. The remedy prescribed by the court below is confiscatory and unsupported by law.

I.

The Acquisition by Hartford of Non-Competing Supplementary and Improvement Patent Rights Was Lawful.*

The patents were not competing.

The first basic issue presented by this test case, as summarized at page 5, *supra,* relates to the legality of patent settlements negotiated in order to solve patent deadlocks. The Hartford settlements were condemned by the District Court on the ground that they constituted and evidenced an illegal combination and conspiracy on the part of the contracting parties to enable Hartford to monopolize gob feeding patents and—thereby—to monopolize the machines embodying the patents and the products thereof.

The court below sought—in part—to justify this sweeping condemnation of the Hartford settlements upon the ground that some of the patents involved—unspecified—were competing and consequently that the combination of such competing patents achieved illegal monopoly. The court said:

> "Hartford has acquired from others a total of 317 patents, and many of these were competing patents" (R. Op. Vol. 153).

This finding, however, is not supported by the evidence—is contrary to the concessions made by counsel for the Government during the trial—and is at variance with the position taken by the court in excluding evidence during the trial. Accordingly the condemnation of the Hartford settlements on this ground was erroneous.

---

* The Hartford assignments of error here relevant are Nos. 1-2, 4-5, 8-28, 32-43, 45-48, 52-58, 60, 62-63, 65, 67-70, 100-102 (R. X, 7708 *et seq.*).

Hartford explained below that it had not acquired competing patents or the right to license under competing patents—that its major acquisitions were clearly supplementary or improvement patents and patent applications (R. VI, 4496-7; R. VII, 5039-40). Accordingly Hartford sought repeatedly to introduce evidence showing the dominating character of its own inventions and the fact that its acquired patents were fragmentary and supplemental in character whose inventions could not be used without practicing Hartford inventions (R. VI, 4405-8, 4502-5; R. VII, 5039-40).

Counsel for Hartford persistently attempted to introduce this evidence, explaining that:

> "• • • we are charged with unlawfully aggregating rights; and we want to show what those rights were" (R. VI, 4504).

In connection with the Hartford-Howard settlement, for example, counsel for Hartford defended his offer of evidence by emphasizing that:

> "• • • we expect the evidence to show that there was no suppression of competition of any kind in buying Howard; but a combination of complementary elements, one of which, to-wit, Howard, could not be used at all unless used in conjunction with Hartford" (R. VI, 4407).

Counsel for Hartford reiterated at every opportunity that the basic Hartford inventions dominated all gob feeding, including the outstanding infringing feeders of others, and that accordingly Hartford was entitled to enter into settlement agreements with respect to those feeders. Counsel strongly argued that:

> "• • • if they [Hartford] had claims in a patent which dominated the apparatus that was outstanding,

they of course could have stopped the use of that other apparatus, provided their patent was actually infringed.

"It is our position, and I think it is supported well by authority, that whatever we could have shut up by proceedings on patents, we have a right to buy, in order to avoid litigation" (R. VII, 5039).

The Government however on each occasion objected to this evidence on the nature and scope of the patents, patent rights and inventions involved in the various Hartford settlements—*on the ground that such matters were not in issue*—and the District Court sustained the objection.

Thus the Government successfully prevented the introduction by Hartford of evidence to prove that Hartford had the basic or dominant inventions on gob feeding while the other parties to its settlement agreements had merely fragmentary or blocking inventions relating thereto:

"Mr. Isseks: I still insist, and I want to make it clear, that there are opinions expressed here as to domination of claims. If that opinion is being offered * * * for the truth of the domination of one over the other, we do object, because that is not in issue in this case.

"The Court: I will sustain the objection unless that is eliminated" (R. VII, 5039).

The Government likewise successfully objected to the introduction of evidence offered by Hartford to demonstrate that the gob feeders put out by concerns other than Hartford, not licensed by Hartford, utilized the dominant Hartford inventions, and accordingly that Hartford could enter into settlement agreements with respect thereto:

"Mr. Isseks: * * * [I understand that the Court is] not taking it [evidence] in order to find out at the conclusion of the case or to make a ruling your-

self as to whether or not Miller infringed Peiler, whether or not Peiler infringed Miller, whether or not Howard infringed Peiler, or whether or not Howard infringed Miller.

"The Court: We are not going into that question" (R. VI, 4504).

In short, the District Court, upon the assertion by the Government that *such was not in issue,* sweepingly excluded evidence offered by Hartford on the prior art, validity or infringement of the patents involved in the Hartford settlement agreements:

"Q. Have you, in connection with the development work that you have referred to, had issued certain patents which you have assigned to the Hartford-Empire Company? A. I have had a number of patents issued to me.

"Mr. Isseks: I assume Your Honor is not taking any of this testimony on the issue of prior art, validity or infringement of patents?

"The Court: That is right" (R. VIII, 5632).

The District Court ruled that he was interested in such evidence only insofar as it related to the state of mind of the parties—flatly stating that:

"I do not intend to determine in my mind whether one device infringed another, or whether it did not, or whether one device was valid and one was invalid" (R. VI, 4504).

Counsel for the Government, in his concluding argument before the District Court, expressly conceded that the Government had never claimed or offered proof that Hartford had acquired patents or patent rights covering an independent method of gob feeding alternative to that of the Hartford feeder—as distinguished from frag-

mentary rights relating to Hartford's own gob feeding system:

> "There is no suggestion that the purpose of the conspiracy was to acquire *competing patents in the sense claimed by the defendants; namely, independent methods of accomplishing the same result.* On the contrary, it is recognized that the parties had conflicts and disputes, and that the rival patents were conflicting in connection with competing businesses" (Fol. 13220).

Counsel for the Government frankly admitted that:

> "The Government offered no proof whatsoever claiming that the defendants had acquired *patents of alternative, independent means*" (Fol. 13221).*

In short, the validity of the Hartford settlement agreements was tested below upon the express concession that the patents and patent rights acquired by Hartford were not claimed to be alternative or independent patents.*

---

* A contention was advanced below by the Government that—while Hartford was not claimed to have acquired independent or alternative patents—nevertheless Hartford did acquire patents which had been used in machines sold in competition with the Hartford machines. These patents, the Government suggested, might be termed "competing patents". In other words the Government claimed that the blocking, supplementary or improvement patents used in imitations of the Hartford machines—distributed without authorization from Hartford—might be labeled "competing". This contention of the Government, however, is lacking in merit. A supplementary patent cannot be converted into a "competing patent" merely by calling it so. Moreover, such a definition is completely at variance with the holdings of this Court and other courts, in the cases which we shall cite hereafter in this Point I, to the effect that supplemental blocking and improvement patents may properly be acquired.

The patents were valid.

Indeed, the validity of the Hartford patent settlements was also tested below on the assumption that the various interference proceedings dissolved by the settlements were correctly terminated—resulting in the issue of valid patents to the inventors entitled thereto. Certain of the patents thereby issued have been sustained in the courts—but even apart from this their validity must be conclusively assumed for all the purposes of this case.

The Government has expressly stipulated that it does not challenge the correctness of any award of priority in the termination of the interference proceedings following the settlements—nor the validity of any of the patents that were issued. Any patents which Hartford thereby obtained —on its own inventions or acquired from others—are viewed as valid patents. The Government expressly stipulated as follows:

> "'(a) That plaintiff does not and will not, in this suit, contest or question the validity of any patent or patents and that it is not necessary for said defendants to offer any evidence to support the presumption of validity of any patent or patents; and
>
> "'(b) That plaintiff does not and will not, in this suit, contest or question the correctness or propriety of any award of priority by the United States Patent Office in any interference, and that it is not necessary for said defendants to offer any evidence in support of said awards" (Stip., R. VIII, 5635).

The Government subsequently did make certain complex and speculative arguments tending to reflect upon the validity of the Hartford patents, including among others the following:

(1) That some of the interferences in the Patent Office may have been wrongly decided because of the manner in which priority was awarded after the settlements or because of alleged non-disclosure with respect to the prior art.

(2) That a certain article entitled "Introduction of Automatic Glass Machinery; How Received by Organized Labor, by William P. Clarke," President of the American Flint Glass Workers Union, was used by Hartford in certain Patent Office proceedings and subsequent litigation involving Hartford patents —concealing the fact that the same had been ghost-written by a representative of Hartford. The article was fully checked and approved by Mr. Clarke, but evidence that the article was true and that it was accurately based upon union proceedings was excluded by the court below.

These arguments, however, were inconsistent with the Government's express stipulation that the validity of the patents would not be attacked, and accordingly these arguments will not be treated here.

The Government is of course bound by its stipulation—the trial was conducted on this basis. The rule in such matters is well stated by Wigmore on Evidence, Section 2588, as follows:

"An express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that *the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it.* This is what is commonly termed a solemn—*i. e.* ceremonial or formal—or judicial admission, or stipulation. It is, in truth, a substitute for evidence, in that it does away with the need for evidence."

The acquisition of non-competing valid patent rights was lawful.

We respectfully submit that the Hartford settlements of patent conflicts—thus demonstrated to involve *valid* and *non-competing* patents—did not violate the anti-trust laws on any theory of law. We have shown that the settlements were erroneously condemned as involving competing patents. We submit that the settlements were not properly subject to attack on any other ground.

This is not the first case that has come before the courts involving the settlement of patent conflicts. There have been many such cases. And the courts have uniformly held that such settlements are not against public policy and have sustained them.

In *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8, for example, this Court specifically sustained an agreement by which one company obtained exclusive rights from another, saying that it was—

> "* * * but a settlement of claims growing out of reciprocal charges of infringement" (p. 33).

Again, in *Bement* v. *National Harrow Company*, 186 U. S. 70, this Court referred to the settlement of litigation regarding the validity of patents as follows:

> "This execution of these contracts did in fact settle a large amount of litigation regarding the validity of many patents, as found by the referee. This was a legitimate and desirable result" (p. 93).

Hartford was not required to continue its "slow and expensive process of litigation," but might properly settle with the non-competing patent owners. The public was not entitled to profit by competition among infringers. *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 358, 364 (C. C. A. 7th).

Under these conditions, as summarized in *United States* v. *Aluminum Co. of America, et al.*, 44 F. Supp. 97 (D. C. S. D., N. Y.):

> "* * * that such a method of [patent adjustment] is lawful in principle was held by the Supreme Court in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, 51, 52" (p. 113).

These cases, we wish to point out, rule not only that settlements are proper but that in connection with such settlements supplementary patents and patent rights may be acquired. In *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, for example, the Court approved in several instances the acquisition of supplementary patents, so that in the interests of efficiency these patents came into a single hand. In that case the Court said:

> "* * * as the witness expressed the situation, 'in a broad way it was a perfect deadlock.' In other words, the United Company had the underlying invention and Plant a patent for a particular form of operation which was necessarily subordinate to the other—a situation familiar in patent law and contests.
>
> "It will be seen, therefore, that there was no other way out of the deadlock, if the inventions were to be used together—that is, embodied in one machine, without infringement—than by ownership in one hand of all the patents" (p. 51).

Again, in the same case, with respect to the acquisition of the Goddu patents, the Court said:

> "No one can tell the strength of the competition that may be in a patent. It may be more than competition; it may be destruction, and the Anti-Trust Act surely does not require the acceptance of that or forbid effort to prevent it. But even if such extreme does not impend, certainly improvement of

business and its efficiency can be striven for without offense to the law" (p. 53).

These cases are of course merely applications of the principle—well recognized in anti-trust cases—that the integration of industry—or the acquisition of non-competing assets—regardless of size—does not constitute restraint of trade. As summarized in *Alexander Milburn Co.* v. *Union Carbide & Carbon Corporation,* 15 F. (2d) 678 (C. C. A. 4th), certiorari denied 273 U. S. 757:

> "The combination results, not in suppression of competition, but in greater efficiency * * * and although, as pointed out by plaintiff, this unified control results in bringing large resources under one management, mere size does not constitute a violation of the act. U. S. *v.* U. S. Steel Corporation, 251 U. S. 417, 40 S. Ct. 293, 64 L. Ed. 343, 8 A. L. R. 1121" (p. 683).
>
> *Accord: International Shoe Company* v. *Federal Trade Commission,* 280 U. S. 291.

Similarly the integration of non-competing and supplemental patents is not restraint of trade. Thus in *United States* v. *American Bell Telephone Company,* 167 U. S. 224, this Court found no objection whatever to the acquisition by the so-called telephone monopoly of supplementary patents:

> "Much is said in the briefs and in the arguments about the practical continuance of the telephone monopoly. * * * But surely that does not abridge the legal rights of any one. The inventor of the latest addition is entitled to full protection, and if the telephone company buys that invention it is entitled to all the rights which the inventor had" (p. 249).

In *United States* v. *Winslow,* 227 U. S. 202, this Court took a similar view with respect to a combination between

the owners of three non-competing supplemental systems of machinery, each of which was covered by separate and independent patents. Mr. Justice Holmes, speaking for the Court, stated:

> "It is said that from seventy to eighty per cent of all the shoe machinery business was put into a single hand.
>
> • • • • • •
>
> But taking it as true we can see no greater objection to one corporation manufacturing seventy per cent of three non-competing groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. *It is as lawful for one corporation to make every part of a steam engine and to put the machine together as it would be for one to make the boilers and another to make the wheels*" (p. 217).

In *Indiana Manufacturing Co.* v. *J. I. Case Threshing Machine Co.*, 154 Fed. 365 (C. C. A. 7th), appeal dismissed 207 U. S. 603, the court found no objection to the fact that:

> "As patents for improvements were issued from time to time appellant bought them up, in the main, until now it owns practically all of the patents that pertain to this art" (p. 370).

Additional cases recognizing the propriety of the acquisition by a single company of supplementary patents are:

United States v. *Motion Picture Patents Co.*, 225 Fed. 800 (E. D. Pa.), appeal dismissed 247 U. S. 524:

> "The owner of a patented device, process, or product may undoubtedly acquire from another any issued patents for improvements, and we see no reason to deny the right of the owners of the original patent, and of the patented improvements, to pool

> their ownerships for their joint or common protection" (p. 810).

Waterbury Buckle Co. v. *G. E. Prentice Mfg. Co.*, 294 Fed. 930 (D. Conn.):

> "In the ordinary course of events it is quite natural that a corporation manufacturing under one patent would attempt to acquire any subsequent improvement patent issued, particularly if it had established, at some expense to itself, a market for its product" (p. 937).

Naturally with the increase in the complexity of modern machinery there is a corresponding increase in the number of supplementary and blocking inventions which the owner of the dominant invention may purchase. So long as competing patents are not involved, however, the mere number of these patents is of course meaningless.

As pointed out by this Court in *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, with respect to a charge that the defendant therein had acquired numerous patents:

> "They give a false impression by their number. They added nothing of obnoxious power to the United Company nor in any practical or large sense removed competition" (p. 54).

The case of *Standard Oil Company* v. *United States*, 283 U. S. 163, cited by the court below, is not in conflict with the decisions cited here. In that case, as this Court pointed out (p. 175), the defendants had obtained rights under "competing" patented processes. Rules laid down by this Court for the patentee who acquires "competing" patent rights do not, of course, apply to a patentee like Hartford who has not acquired such rights.

No acquisition of all patents occurred.

The District Court sought to condemn the Hartford patent settlements—not only on the erroneous theory that com-

peting patents were involved—but also on the ground that Hartford thereby obtained control of—

> "* * * an aggregation of *all* the patents that pertained to the gob feed process" (R. Op. Vol. 153).

This ground likewise is totally erroneous.

In the first place, it is significant that there is no finding of fact whatever to support this statement in the opinion. If any weight is to be attached to this element of the court's reasoning, the burden of proof was upon the Government to establish the fact—but it made no attempt to do so.*

In the second place, a combination of supplementary patents might very naturally include all the patents relating to a particular machine and yet not be in any sense in violation of law. There could hardly be a monopoly of non-competing patents.

The record does in fact show the existence of many patents relating not only to feeders but to supplementary forming machines and lehrs—which are not owned by Hartford and under which Hartford is not even licensed (*e.g.* Stip., Ex. 1576, R. XI, 8043, 8045-7; Stip., Ex. 1569; folio 15395; Stip., Ex. 946, Sched. C. (lehr and stacker patents), R. X, 7956-63).

Hartford properly settled with Owens.

Finally, the District Court sought particularly to condemn the 1924 Hartford-Owens settlement.

The District Court singled this settlement out above all others as objectionable because Owens had formerly licensed to the industry the use of the old suction method of manufacturing glass containers—succeeded by gob feeding.

---

* The Government did not even propose a finding of fact to this effect.

But Owens had gone out of the suction licensing business in 1918 (R. III, 1803; R. VIII, 6227).

Was Hartford forbidden to settle a *gob feeding* patent dispute with Owens arising out of Owens' *gob feeding* patents, merely because Owens was an ex-suction licensor? If so, Hartford could never have used its gob feeding inventions, as Owens had acquired supplementary feeding inventions that completely blocked Hartford (*supra*, pp. 31-32).

Hartford has never acquired any rights under Owens' suction patents, as we have demonstrated, and moreover this whole question is completely academic because of the fact that all important suction patents have long since expired and anyone who desires to use the suction method can do so (See *supra*, pp. 12-13, 33).

The judgment should be reversed.

The District Court, we wish to emphasize, has condemned *each and every patent settlement negotiated by Hartford*—even where *non-exclusive* cross-license agreements were involved.

Such sweeping condemnation of agreements relating to supplementary and improvement patent rights, we submit, constitutes clear reversible error.

II.

The Acquisition by Hartford of Non-Competing Supplementary and Improvement Patent Rights Was Not Rendered Unlawful Because the Result, Foreseen and Intended, Was to Achieve Temporary Dominance.*

The intent of the parties was proper.

The District Court generally asserted, in support of its more specific objections to the Hartford patent settlements,

---

* The Hartford assignments of error here relevant are Nos. 2, 11, 14, 16, 18, 20, 22, 24, 26, 28, 37-40, 42, 45, 49, 51-58, 60, 62-63, 65, 67-70, 100-102 (R. X, 7709 *et seq.*).

that the contracting parties had foreseen and intended Hartford thereby to "dominate" the gob feeding art.

The court, and the Government, seemed to take the position that even if the acquisition of patents and patent rights might possibly be proper as part of a patent settlement, where the patents are of negligible importance, still such acquisition is clearly illegal if the patents relate to a really great improvement in the art, such as gob feeding. A patent settlement relating to a great improvement like gob feeding is apparently condemned because the patent owner negotiating the settlement foresees that the resulting machine or product, made possible by the combination of patents and patent rights, will be so much superior in efficiency that it will be preferred to all others and thereby will achieve temporary "dominance".

The court said in its opinion (R. Op. Vol. 28), "We have already seen that it was Hartford's desire to obtain domination of the feeder art."

The court explained (R. Op. Vol. 153), that this Hartford "desire" constituted a "plan * * * to attain dominance by means of patent ownership and control".

There is no question that the men behind Hartford had complete faith in their new gob feeding system of machinery. They believed that it was so superior that if they could get their own basic patents issued—and obtain the right to license under the non-competing supplementary patents claimed or owned by others—every one would want to use it. And until they had settled the patent conflicts, neither they nor anyone else could safely and lawfully develop and distribute this improved and efficient system.

But if—as the cases previously cited show—it was lawful for them under these circumstances to acquire non-competing gob feeding patents—how could that become unlawful merely because they hoped and expected to produce

thereby very superior gob feeding machines—and thus achieve dominance of the gob feeding art?

Surely a lawful act does not become unlawful merely because you intend to do it.

Unquestionably they hoped to collect royalties and make money from their superior gob feeders. Most inventors hope to make money from their inventions and the statute contemplates they shall.

Unquestionably also they expected to collect these royalties and make this money by exercising exclusive ownership of the basic patents on their superior gob feeders, free of the blocking inventions of others. The constitutional provision as to patents, we wish to emphasize, does not end merely with stating its purpose to promote the useful arts. It goes on and prescribes the specific *means* by which the arts are to be promoted—namely, by giving to inventors, for a limited time, exclusive or monopoly rights over their inventions. The means is as truly a part of the constitutional policy as the end to be attained.

Constitution, Article I, Section 8:

> "The Congress shall have power • • •
>
> • • • • • •
>
> "To promote the Progress of Science and useful Arts, *by* securing for limited Times to Authors and Inventors the *exclusive* Right to their respective Writings and Discoveries. • • •"

It is for this reason that Congress, in adopting our patent laws, has unreservedly guaranteed to the inventor an "exclusive" right to his inventions.

United States Code, Title 35, Section 40:

> "Every patent shall contain • • • a grant to the patentee, his heirs or assigns, for the term of seven-

> teen years, of the *exclusive* right to make, use, and vend the invention or discovery * * *."

Can it be seriously contended that inventors and research organizations such as Hartford, in addition to their natural scientific pride in promoting useful arts, must never seek the monopoly rewards held out by the Constitution as the incentive to such effort? And that if they do have such rewards in mind, then automatically they are forever disabled from acquiring any supplemental, non-competing patent rights,—no matter how necessary such acquisitions may be in order to insure the very progress of the arts which every one desires—upon pain of forfeiting their own patents?

Hartford—in the enjoyment of the exclusive rights granted to it by the patent law—was not compelled to exercise those exclusive patent rights as a "quasi-trustee" for the public. The fact that Hartford's patents were issued by the Patent Office did not make these patents public property. As this Court said in *U. S.* v. *American Bell Telephone Co.*, 167 U. S. 224:

> "Counsel seem to argue that one who has made an invention and thereupon applies for a patent therefor, occupies, as it were, the position of a quasi trustee for the public; that he is under a sort of moral obligation to see that the public acquires the right to the free use of that invention as soon as is conveniently possible. We dissent entirely from the thought thus urged. The inventor is one who has discovered something of value. It is his absolute property. He may withhold the knowledge of it from the public, and he may insist upon all the advantages and benefits [i.e. monopoly] which the statute promises to him who discloses to the public his invention" (p. 250).

We submit that the defendants should not be condemned because in the course of their discussions and negotiations they used the words "monopoly", "control", "dominance". Of course they did. They hoped through the perfecting of their system to achieve lawful patent monopoly. They had a right to do so. That is the intent which Congress and the Constitution expect inventors to have. That is a legitimate and justifiable incentive.

In *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, this Court totally rejected the contention that an inventor in seeking and exercising monopoly control over its inventions illegally restrained trade:

> "Of course, there is restraint in a patent. Its strength is in the restraint, the right to exclude others from the use of the invention, absolutely or on the terms the patentee chooses to impose. This strength is the compensation which the law grants for the exercise of invention. Its exertion within the field covered by the patent law is not an offense against the Anti-Trust Act" (p. 57).

The District Court objected that the defendants sought "monopoly". But this Court in *Bement* v. *National Harrow Company*, 186 U. S. 70, expressly stated that the object of the inventor under the patent laws should be "monopoly":

> "The very object of these [patent] laws is *monopoly*" (p. 91).

The District Court further condemned the defendants because they sought "domination" over gob feeding. But again this Court in *United States* v. *General Electric Co.*, 272 U. S. 476, specifically denied that such "domination" was illegal:

> "We do not question that in a suit under the Anti-Trust Act the circumstance that the combination effected secures *domination* of so large a part of the business affected as to control prices is usually most important in proof of a monopoly violating the Act. But under the patent law the patentee is given by statute a monopoly of making, using, and selling the patented article" (p. 485).

The District Court in particular condemned the defendants for designating as "pirates" the copyists of the Hartford feeder who were distributing the Hartford equipment under other names to the industry free of any royalty payment to Hartford. But Chief Justice Marshall himself set the example for Hartford in *Grant* v. *Raymond*, 6 Pet. 218, wherein he condemned those who indulged in "pirating" an invention as follows:

> "* * * those who examine it [specification of patent] for the purpose of *pirating* the invention * * * are not entitled to much favor" (p. 243).

It cannot too strongly be stressed that Hartford, in exercising its exclusive rights granted by Congress under the patent law, took nothing from the public that it had ever previously enjoyed. Hartford merely received a temporary patent monopoly over something *new* which it had discovered and disclosed for the public benefit. As this Court in *U. S.* v. *Dubilier Condenser Corp.*, 289 U. S. 178, emphasized:

> "An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge. * * * He may keep his invention secret and reap its fruits indefinitely. In consideration of its disclosure and the consequent benefit to the community, the patent is granted. An ex-

> clusive enjoyment is guaranteed him for seventeen years, but upon the expiration of that period, the knowledge of the invention enures to the people, who are thus enabled without restriction to practice it and profit by its use" (pp. 186-187).

Counsel were properly consulted.

The District Court, in discussing further the alleged motives underlying the Hartford settlements, sought to infer an illegal intent on the part of Hartford because of various documents—indicating that questions under the anti-trust laws were considered in connection with certain of the settlements. These very documents, however, show that whatever action was taken by Hartford was upon the advice and approval of its counsel.

It is true that Hartford's counsel did consider whether or not any violation of the anti-trust laws might result from these transactions. They would have been both negligent and unintelligent if they had not done so. And it is also true that counsel for Hartford did consider on one or more occasions what the result might be if it turned out that their opinion was erroneous. It would be only natural for counsel and client—when dealing with a law as uncertain as the anti-trust law—to consider what might happen if counsel should turn out to be mistaken.

Surely where defendants act upon advice of counsel—in a situation which by its nature could not possibly be free from doubt—their conduct should not be regarded as unconscionable because they were sufficiently prudent to give thought as to what might happen if counsel were mistaken.

Ownership in one hand of non-competing patents.

The District Court also questioned the intent of the defendants in another way. The court objected that the defendants intended that rights under these non-com-

peting supplementary patents should be brought into one hand—under the various license and other agreements. But this objective was repeatedly approved in the cases cited previously in *Point I, supra.*

For example, in *United States* v. *United Shoe Machinery Company,* 247 U. S. 32, the Court expressly recognized that:

> "* * * there was no other way out of the deadlock, if the inventions were to be used together—that is embodied in one machine, without infringement—*than by ownership in one hand* of all the patents" (p. 51).

What the Government and the court below really objected to, of course, was the fact that there were not several different independent competing systems of gob feeders instead of only one system—the system invented by Hartford. But gob feeding cannot be split into several systems. It is unique and *sui generis*—and by its inherent nature one basic system with slightly varying types of feeders all utilizing basic Hartford inventions. No judgment can change this economic fact.

Even if Hartford had never entered into any settlement agreements and instead had fought the blocking interferences to a bitter end, the glass container manufacturers would still have had to come to Hartford for a license under its basic inventions before they could have used that system —if Hartford had survived this patent fight. And for a license under the fragmentary inventions they would have had to go to any other surviving patentees also—including Owens—who had adopted a policy of not granting licenses to anyone.

Is there any reason to suppose that Owens or Hazel-Atlas or any of the other companies that threatened Hartford with real or nuisance litigation would have been any

more lenient or forbearing toward the small container manufacturers if there had been no Hartford in the field?

What the Government and the court below are really objecting to is the fact that the new gob feeding system is patented at all. If there had been no patents, then container manufacturers would not have had to go to anyone for permission to use the gob feed system.

Apparently the only way to bring about that situation was to destroy the patents altogether—which the court below actually did.

Patents are not given to be disregarded—but to be respected and obeyed.

There is no question that the gob feed system constituted a great advance in the progress of the art—an advance from which the public has benefited much more than Hartford.

The patents issued. The Government does not here deny that they were valid. Accordingly Hartford is entitled to the monopoly which these patents conferred. The acquisition of that monopoly surely did not become unlawful merely because this result was foreseen and intended.

III.

The Exercise by Hartford of Its Patent Rights Through Limited Licenses Was Lawful.*

Limited licenses were issued.

The third basic issue presented by this case, as summarized at page 5, *supra*, relates to the question of limited licensing. As set forth above in the factual statement, Hartford, in 1914, long prior to any of the settlement agree-

---

* The Hartford assignments of error here relevant are Nos. 6-7, 29-31, 39-41, 44, 47-48, 50, 59-61, 63-71, 100-102 (R. X, 7710, *et seq.*).

ments herein challenged, determined upon the following licensing policy:

(1) To issue licenses—not to all applicants—but only to such a number as it considered reasonable; and

(2) To limit those licenses—in accordance with prior industry experience—to the types of containers which the licensees had previously manufactured.

Hartford exercised these licensing policies liberally, however, as we have demonstrated. At the time of this suit Hartford had licensed numerous container manufacturers for each field of feeder use; had licensed in all fields of feeder use 41 container manufacturers; and had thereby licensed an industry capacity which was greatly in excess of demand. See pages 56-57 and 62, *supra*.

This Hartford policy of limited licensing was widely known. Licensees accepting Hartford licenses knew of this policy. A patent owner may properly use such a policy as a means of securing appropriate royalties—and with the full realization that such a policy will make his licenses more attractive. And if the licensor may adopt such a policy, surely it is not improper for the licensee to accept a license with the expectation that he will benefit from such degree of patent protection as the licensor chooses to accord its licensees. Such considerations—in greater or less degree—must be in the minds of licensors and licensees in every licensing situation. Surely such normal considerations cannot be regarded as turning licenses into illegal "conspiracies".

The District Court nevertheless held that these limited licenses violated the anti-trust laws.

It is not entirely clear whether the court took action because it considered the policy of limited licenses to be illegal *per se*—or because it was followed by the various patent settlements of Hartford.

The fact remains that the judgment prohibits not only Hartford—but any of the defendants—from ever issuing these limited licenses hereafter. The prohibition is absolute—and independent of any illegal combination. It also applies to any machine or process patents whatsoever, and not merely to the patents which were involved in this case.

The judgment thereby follows substantially the recommendations that the patent laws be changed to prohibit limited licenses, which were made to Congress in connection with the T. N. E. C. It is obviously calculated to put into effect the T. N. E. C. recommendation for changes in the patent law—without awaiting Congressional action.

We submit that the court was clearly in error in holding these limited licenses to be illegal, and in prohibiting them hereafter. The motive which actuated Hartford in adopting these licenses was to collect substantial royalties—and we believe that the adoption of these licenses for such purposes was clearly a reasonable way for Hartford to secure to itself the reward to which it is entitled under the patent laws.

It is difficult to see how Hartford could have violated the law in adopting limited licenses—in 1914—for the reason that:

> "The Hartford Company * * * realized that it could not charge as uniformly high rates under a system of unrestricted licenses as it could with restricted licenses" (R. Op. Vol. 101).

Limiting the number of licensees was lawful.

There can be no question that Hartford—like any other patent owner—was entitled to limit the *number* of its licensees. The owner of a patent has a monopoly. His refusal to part with it does not increase that monopoly or restrict any lawful competition. He may either keep the

monopoly himself or he may grant licenses to only a limited number of licensees. He may do this with the express intention of avoiding over-capacity and excessive competition and consequent inability to pay substantial royalties. He has no obligation to adopt a licensing policy that would so dilute the value of his exclusive rights that they would lose that quality of exclusivity which is the very essence of the patent grant.

Even though the effect of limiting the number of licensees prevents the development of excessive competition, and thereby "stabilizes" the industry, that is not unlawful. It is merely the indirect consequence of a legitimate exercise of patent rights. *Cf. Vulcan Mfg. Co.* v. *Maytag Co.*, 73 F. (2d) 136, 138-139 (C. C. A. 8th), appeal dismissed 294 U. S. 734.

The right of a patent owner to select and limit the number of his licensees, for the purpose of collecting substantial royalties, is supported by numerous cases in this Court holding that the very object of a patent is to permit an inventor to exclude whomever he pleases from using his patent property. To cite a few of these cases—

United States v. *United Shoe Machinery Co.*, 247 U. S. 32:

> "* * * we said in the *Paper Bag* patent case that he may keep his invention out of use. Therefore, he necessarily has the power of granting it to some and withholding it from others, a right of selection of persons and terms" (p. 58).

Continental Paper Bag Company v. *Eastern Paper Bag Co.*, 210 U. S. 405:

> "* * * whenever this court has had occasion to speak it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute" (p. 425).

Crown Die & Tool Company v. *Nye Tool & Machine Works*, 261 U. S. 24:

> "A patent confers a monopoly. So this Court has decided in the *Paper Bag Case, supra*, and in many other cases. The idea of monopoly held by one in making, using and vending connotes the right in him to do that thing from which he excludes others" (p. 37).

This Court indeed has expressly held not only that a licensor may limit the number of his licenses but may license only one user—by an exclusive license—if he so desires. It will be recalled that Hartford in a few instances issued such licenses.

To quote from illustrative cases approving the grant of exclusive licenses:

Bement v. *National Harrow Company*, 186 U. S. 70:

> "There is nothing which violates the act in the agreement that plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant" (p. 94).

Virtue v. *Creamery Package Company*, 227 U. S. 8:

> "• • • the Disbrow Company • • • conveyed • • • the exclusive right in the patents for certain named royalties. This was no violation of law" (pp. 36-7).

United States v. *General Electric Co.*, 272 U. S. 476:

> "The owner of a patent may assign it to another and convey (1) the exclusive right to make, use, and vend the invention throughout the United States, or (2) an undivided part or share of that exclusive right, or (3) the exclusive right under the patent

within and through a specific part of the United States" (p. 489).

Accord: Independent Wireless Telegraph Co. v. *Radio Corp. of America,* 269 U. S. 459, 469-73.

Limiting the licensed use was lawful.

Again, there is no question but that Hartford was entitled to limit the *scope* of the licensed activities of its licensees to particular fields of container ware. Hartford was not required to license users of its patent property to do anything they pleased with that property. It might license one use to one licensee and another use to another.

As emphasized by this Court in *Bement* v. *National Harrow Company,* 186 U. S. 70, a restraint imposed upon the use of a patented invention is not an illegal restraint of trade:

> "It is true that it has been held by this court that the act included any restraint of commerce, whether reasonable or unreasonable. * * * But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act we have no doubt was never contemplated by its framers" (p. 92).

This Court has uniformly upheld licenses limiting the scope of the licensed use. In the very early and frequently cited case of *Rubber Company* v. *Goodyear,* 9 Wall. 788, for example, this Court sustained a license limited as to use, saying:

> "This instrument gives * * * a free license to use the said Goodyear's gum-elastic composition for

> coating cloth for the purpose of japanning, marbling, and variegate japanning, at his own establishment" (p. 799).

Very recently, in *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, this Court upheld a similar limited license, ruling:

> "Pertinent words of the license are these: 'To manufacture . . . and to sell only for radio amateur reception, radio experimental reception and radio broadcast reception . . .'. Patent owners may grant licenses extending to all uses or limited to use in a defined field" (p. 181).

In a subsequent rehearing of the last named case, 305 U. S. 124, this Court, in again upholding the validity of limited licenses, quoted with approval a stipulation entered into by the parties to the effect that:

> "• • • 'it is common practice where a patented invention is applicable to different uses, to grant written licenses to manufacture under United States Letters Patents restricted to one or more of the several fields of use permitting the exclusive or non-exclusive use of the invention by the licensee in one field and excluding it in another field' " (p. 127).

The District Court has so sweepingly condemned the limited licensing policy of Hartford, adopted in order to bring to Hartford its royalties, that it seems appropriate to contrast the provisions of its judgment with the uniform holdings of this and other courts to the contrary.

Thus—

(1) *In general:* The judgment broadly forbids defendants to issue limited licenses to exclusive or non-exclusive

licensees. The judgment does not even condition its disapproval of limited licenses upon the existence of any alleged illegal conspiracy (Judgment, §29(a) and (f), R. X, 7672-3. For *contra* cases, see *General Talking Pictures Corp.* v. *Western Electric Co.*, 305 U. S. 124, 127; *Becton, Dickinson & Co.* v. *Eisele & Co.*, 86 F. (2d) 267, 268-270 (C. C. A. 6th), certiorari denied 300 U. S. 667; *Owens Bottle Co.* v. *Libbey Glass Co.*, 9 F. (2d) 564, 565 (C. C. A. 6th); and *Innis, Speiden & Co.* v. *Food Machinery Co.*, 2 F. R. D. 261, 262-263 (D. Del.).

(2) *Territory:* The judgment specifically enjoins the licensing of a patented machine or process for use in specified territory (Judgment, §29(a)(7), R. X, 7672). For *contra* cases, see *Hobbie* v. *Jennison*, 149 U. S. 355, 363-4; *Cincinnati Siemens-Lungren Gas Illuminating Company* v. *Western Siemens-Lungren Company*, 152 U. S. 200, 205; and *St. Louis Street Flushing Machine Co.* v. *Sanitary Street Flushing Machine Co.*, 178 Fed. 923, 926-927 (C. C. A. 8th).

Indeed the patent law itself expressly permits the owner to convey an exclusive right under his patent "to the whole or any part of the United States" (35 U. S. C., Sec. 47, R.S. Sec. 4898).

(3) *Quantity:* The judgment further enjoins the licensing of a patented machine or process to make definite quantities (Judgment, §29(a)(4), R. X, 7672). For *contra* cases, upholding quantity limitations upon the use of a patent, see *Mitchell* v. *Hawley*, 16 Wall. 544, 546, 548-9; *Aspinwall Manufacturing Co.* v. *Gill*, 32 Fed. 697, 698 (C. C. D. N. J.); and *Goshen Rubber Works* v. *Single Tube Automobile & Bicycle Tire Co.*, 166 Fed. 431, 432 *et seq.* (C. C. A. 7th).

(4) *Type of good:* The judgment enjoins the licensing of a patented machine or process to make articles of a definite type or character (Judgment, §29(a) (1) and (3) R. X, 7672). For cases *contra,* approving licenses which limit the type or character of (patented and unpatented) articles made by use of the patented invention, see *Bement* v. *National Harrow Company,* 186 U. S. 70, 72-75, 90; *Cinema Patents Co., Inc.* v. *Columbia Pictures Corporation,* 62 F. (2d) 310, 311-312 (C. C. A. 9th); *Pope Manufacturing Co.* v. *Owsley,* 27 Fed. 100, 104 (C. C. N. D. Ill.); *George Close Co.* v. *Ideal Wrapping Mach. Co.,* 29 F. (2d) 533, 534-535 (C C. A. 1st); and *Good Humor Corporation of America* v. *Popsicle Corporation of United States,* 59 F. (2d) 344 (D. Del. 1932).

(5) *Use:* The judgment enjoins the licensing of a patented machine or process to make articles intended for a certain use (Judgment, §29(a)(2), R. X, 7672). For cases *contra,* recognizing the validity of licenses which describe (patented and unpatented) articles made thereunder in the terms of the use intended, see *Rubber Company* v. *Goodyear,* 9 Wall. 788, 799; *Vulcan Mfg. Co.* v. *Maytag Co.,* 73 F. (2d) 136, 138-139 (C. C. A. 8th), appeal dismissed 294 U. S. 734; and *Sinko Tool & Mfg. Co.* v. *Casco Products Corporation,* 89 F. (2d) 916-918 (C. C. A. 7th).

(6) *Market:* The judgment enjoins the licensing of a patented machine or process to make articles intended for certain markets (Judgment, §29(a) (5), R. X, 7672). For cases *contra,* recognizing the validity of licenses which describe the licensed use in terms of the future market of the (patented or unpatented) article made by the patented invention, see cases cited *supra* under (4) and (5), and also *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175, 179-182, and 305 U. S. 124,

127; *Westinghouse Electric & Mfg. Co.* v. *Tri-City Radio Electric Supply Co.*, 23 F. (2d) 628, 630-631 (C. C. A. 8th); *Libbey Glass Co.* v. *McKee Glass Co.*, 216 Fed. 172, 176 (W. D. Pa.), affd. 220 Fed. 672 (C. C. A. 3rd), certiorari denied 238 U. S. 624; and *Radio Craft Co.* v. *Westinghouse Electric & Mfg. Co.*, 7 F. (2d) 432 (C. C. A. 3rd).

(7) *Sharing of royalties:* Finally, the judgment even enjoins licensors from giving a lower royalty rate to a licensee contributing patent rights than to licensees contributing no rights, through sharing the licensor's royalty income with such licensee (Judgment, §29(f), R. X, 7673). For cases *contra*, see *Thorn Wire Hedge Company* v. *Washburn and Moen Manufacturing Company*, 159 U. S. 423; *United States Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 Fed. 364-365, 368-369 (C. C. A. 9th); and *Standard Oil Company* v. *United States*, 283 U. S. 163, 170-171.

The extreme and unprecedented nature of this judgment is best illustrated by the concluding portion of the judgment dealing with limited licenses (§29(f), R. X, 7673), which sweepingly declares that a patentee—whether of a patented product or of a patented machine—may never grant licenses giving a "preferential position" to one licensee over another through "different provisions of licensing".

A licensor may consult with licensees.

The District Court made reference to the fact that Hartford, in issuing its limited licenses, at times sought information from and consulted with its licensees. From this the court inferred that Hartford was somehow acting illegally. But such an inference is completely unrealistic. It would be absurd to suppose that Hartford or any licensor

would not on occasion hear what its existing licensees had to say. It would be very strange if it were made unlawful to do so. Why should a licensor be forever placed *incommunicado* with its licensees? It is an exaggeration to treat these sporadic contacts with its licensees as constituting a "conspiracy" between Hartford and its licensees.

Hartford had no obligation to consult with its licensees. But from the standpoint of sound business and decent human relations, it was very natural that it should do so. Hartford's decisions were of course its own decisions. It nevertheless had a right to make investigations for the purpose of ascertaining all the facts necessary to form its own opinion and then to decide after taking into consideration the information obtained from all sources. As a matter of fact its decisions were often entirely at variance with the views expressed by its licensees (R. V, 3235 *et seq.*).

The courts have hitherto permitted licensors to consult with licensees. *Cf. United States Consolidated Seeded Raisin Co.* v. *Griffin & Skelley Co.*, 126 Fed. 364 (C. C. A. 9th).

The only situation in which Hartford consulted one of its licensees by agreement was during the period of the 1924 Owens settlement agreement—modified and finally cancelled during 1931-1935—when Hartford was not permitted to sublicense under *Owens* blocking patents without *Owens'* consent. This requirement for consultation was dropped many years before this suit was brought (Ex. 411, R. XII, 9102).

A licensor may act on complaints by licensees.

The District Court also seemed to regard it as improper that certain licensees complained to Hartford with respect to unlicensed competition—especially where those competitors, paying no royalties, were cutting prices—and that Hartford acted on those complaints at times by bringing

infringement suits. But this could scarcely be unlawful. It is only fair for a licensor to protect licensees against unlicensed competition. Indeed this Court has held that a licensor may expressly covenant to do so in the license itself. In *Virtue* v. *Creamery Package Mfg. Co.*, 227 U. S. 8, the Court said:

> "* * * it was provided that the Owatonna Company should protect the Creamery Package Mfg. Co. from all suits for infringement, defend the validity of the patents and promptly attack infringers. This provision is especially urged by plaintiffs as showing a common and illegal purpose between the companies. It has not that quality. It is but an assurance of title to the rights conveyed (p. 33).
>
> * * * * * *
>
> "The contracts we have shown were legal conveyances of rights, and the provision for the prosecution of infringement suits was but an assurance of those rights. Patents would be of little value if infringers of them could not be notified of the consequences of infringement or proceeded against in the courts" (pp. 37-38).

To the same effect, see *International Visible Systems Corp.* v. *Remington Rand, Inc.*, 65 F. (2d) 540, 542 (C. C. A. 6th).

The Government has expressly conceded that all of Hartford's infringement suits were brought in the *bona fide* belief that the defendants had infringed the Hartford patents (R. I, 565).

Hartford like other patent licensors, in making decisions on matters relating to licensing, including the institution of litigation against unlicensed infringers, took into consideration all elements that might injure its licensees and thus affect its royalty income. What other consider-

ation would any licensor take into account? Certainly Hartford was not required to adopt licensing policies which for sound business reasons it deemed injurious to itself.

A licensor may indirectly affect competition.

In the court below much was made of the argument that the use by Hartford of licenses limited either as to the number of licensees or as to fields of use is unlawful because it affects the total quantity of competition and thereby—indirectly—affects the price of glassware made by using the patented machines.

It is submitted that this is a completely specious argument. As we have seen, the owner of a patent is entitled to retain the exclusive use himself, or to limit the number of persons with whom the exclusive use is shared, in the exercise of intelligent self-interest. He is entitled to do this for the very purpose of making his licenses attractive. And surely he and his licensees should not be regarded as being guilty of "conspiracy" because the latter accept licenses knowing that such is the policy of the licensor and hoping to be benefited thereby and to share the exclusivity which is the essence of the patent. The very nature of the patent is opposed to competition, and any indirect effect of such limitation does not render illegal Hartford's exercise of its admitted patent rights. As this Court said in *Virtue* v. *Creamery Package Co.*, 227 U. S. 8, 32:

> "Of course, patents and patent rights cannot be made a cover for violation of law, as we said in *Standard Sanitary Manufacturing Company* v. *United States*, 226, 20. But patents are not so used when the rights conferred upon them by law are only exercised" (p. 33).

The limited license to Lynch was lawful.

In one instance only was a license found by the District Court to violate the Clayton Act.

The license thus attacked was the Hartford license agreement with Lynch. Hartford, in licensing Lynch to manufacture forming machines embodying Hartford patents, authorized Lynch to transfer such patented machines only to licensees holding forming machine licenses from Hartford. Hartford did not wish to authorize the use of its patents except under licenses granted by itself. The District Court held that this violated Section 3 of the Clayton Act (see R. Op. Vol. 72)—despite the fact that the Clayton Act does not apply to patent licenses, *Steiner Sales Co.* v. *Schwartz Sales Co.*, 98 F. (2d) 999, 1007-8 (C. C. A. 10th), certiorari denied 305 U. S. 662, and despite the fact that Hartford's agreement with Lynch had been amended to remove this limitation more than two years before the judgment in this case (Ex. H-5027, R. XIII, 9532-8).

We submit that this holding constituted clear error.

The general public interest is served by limited licenses.

Since this case is a test case—which will undoubtedly be regarded as a guide for the determination of the rights of patent owners—we desire to point out in concluding this discussion that public policy clearly requires that the right to issue limited licenses—heretofore universally recognized—should be continued.

A limited license is not a covenant whereby a licensee agrees to stay inside a specified field. It is a *permission* to use the licensor's patented property within that field—a waiver of the licensor's right to sue therefor. *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 181. The licensee remains free to use any other product or process in any manner and in any field that he desires.

The so-called "restrictive" license to which the District Court kept referring, therefore, is actually but an authorization, limited in nature, to use a patent which the licensee otherwise could not have used at all.

It is exceedingly important that inventors should have the right to issue these limited "permissions". Otherwise the extension into popular use of new discoveries will be greatly curtailed and delayed. The following two illustrations readily demonstrate this.

(a) Assume that a patentee, who is primarily interested in a major use for his patent, is willing to license by-product uses to others—*i.e.* grant licenses restricted to those by-product uses. The District Court's ruling prohibiting limited licensing would cause the patentee to use his patent himself, as planned, but to refrain from granting the by-product licenses. In other words, the use of the patent would be hindered rather than expanded.

(b) Assume that a patentee, who is primarily interested in granting licenses under his patent, can license in one field at a high rate where the licensed use would be very profitable and in another field at a low rate where the licensed use would be less profitable—*i.e.* grant licenses limited to one or the other of these fields. The District Court's ruling prohibiting limited licensing would cause the patentee to license his patent in all fields at the high rate, in order to get the maximum return, thereby making it economically impossible for anyone to take out a license for use in the less profitable field. Once again, the use of the patent would be hindered rather than expanded.

An invention often has numerous possible uses. By granting limited licenses to companies in different fields the inventor can make such licenses attractive to each licensee

and greatly facilitate and accelerate the use of his invention.

It is because of this great public need for limited licensing that Congress has repeatedly declined to enact legislation prohibiting such licensing. Bills outlawing such licensing have been pressed upon Congress for many decades, without success. See, for example, among the many unsuccessful bills attempting to require compulsory licensing, the Tillman Bill of 1893, H. R. 10314 of the 52nd Congress; Gore Bill of 1911, S. 2116 of the 62nd Congress; Stanley Bills of 1922, S. 3225 and S. 3410 of the 67th Congress; King Bill of 1931, S. 22 of the 72nd Congress; and Fay Bill of 1939, H. R. 7192 of the 76th Congress.

For other unsuccessful bills seeking the abolition of limited licensing, see the Oldfield Bill of 1914, H. R. 15989 of the 63rd Congress; and O'Mahoney Bill of 1942, S. 2491 of the 77th Congress.

The recent report of the National Patent Planning Commission, appointed by the President to study this subject, carefully examines the T. N. E. C. proposal to prohibit limited licensing and concludes that such a prohibition would "not be a beneficial innovation in our patent system" (House Doc. No. 239, 78th Cong., 1st Sess., pp. 3 and 9).

The limitations were discontinued before trial.

In any event, as we have previously pointed out in the factual statement (*supra*, pp. 69-73), the limitations in the Hartford's licenses were terminated by amendment or irrevocable waiver at the beginning of this suit—and before the trial actually began.

Hartford did not take this action because such license limitations were illegal, for the Supreme Court had repeatedly approved of such licenses.

The Government itself had recognized that the Hartford licenses appeared to be valid under these Supreme Court cases. Even after this suit was commenced, Assistant Attorney General Thurman W. Arnold conceded at a Congressional hearing that the Hartford license limitations or restrictions "apparently were approved by the Supreme Court". Referring to the negotiations to settle this case the Assistant Attorney General stated (Final Report of the T. N. E. C.; Sen. Doc. No. 35, 77th Cong., 1st Sess.):

> "In the *Glass Container* case, the *Hartford Empire* case, we simply declined to enter into any decree at all. We thought that there was a case where we were asking them to give up certain restrictions which *apparently were approved by the two cases decided by the Supreme Court.* We thought there was a case in which we shouldn't ask for a decree because we would have had *to go beyond the law*" (p. 115).

Hartford irrevocably waived these license limitations, however, because this course seemed preferable to undergoing long and costly litigation (R. I, 573-584, 608-612; Hartford Supp. Ans., R. I, 435-443; Ex. H-5025, R. XXIV, 14731-5; R. II, 1472-80).

Any suggestion that these licenses could now be turned into limited licenses wholly ignores the practical facts. Once a system of unlimited licenses has been established, it is impossible to change it—either from the standpoint of practical relations with the licensees or from a legal standpoint.

We submit that this cancellation rendered moot the issue as to limited licenses. A similar situation arose in the case of *Standard Oil Co.* v. *U. S.*, 283 U. S. 163, and in that case this Court said:

> "The remaining issues in the case have become moot. The Government objected to a number of early Indiana Company licenses which contained cer-

> tain territorial restrictions on the production of cracked gasoline * * *. At the hearing before the District Court it appeared that these provisions had never been enforced. Upon the court's request the objectionable clauses were voluntarily cancelled some months before the entry of the decree. Similarly, the propriety of certain blanket acknowledgments of patent validity in the first contract, and in a number of licenses under later contracts, were questioned by the lower court. At its suggestion, these provisions also were formerly cancelled by the parties. As the relief here sought is an injunction, and hence relates only to the future, * * * the alleged validity of such provisions has become moot" (pp. 181-2).

At the very least this action—when taken together with the discontinuance long prior to this suit of many of the other practices and agreements complained of—should have been given favorable consideration by the court below in determining the appropriateness of the drastic penalties sought to be imposed on the defendants by the Government.

Other cases in which the termination of agreements before trial were given weight in determining the action to be taken by the court are:

> *Andersen* v. *Shipowners' Ass'n*, 31 F. (2d) 539, 543 (C. C. A. 9th), certiorari denied 279 U. S. 864;
>
> *General Talking Pictures Corp.* v. *American Telephone & Telegraph Co.*, 18 F. Supp. 650, 664, 666-7 (D. Del.);
>
> *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. (2d) 395 (C. C. A. 10th).

Even if the Court should rule that this change did not render the question moot, so that it would prevent an in

junction against the issue of such licenses in the future, nevertheless the cancellation should be considered in determining the nature of any further remedy granted. There is no reason why (1) the existing unlimited licenses granted by Hartford should be stricken down as illegal *per se,* or (2) Hartford be deprived of the royalties paid under such unlimited licenses which are now held by the Hartford receiver as "earmarked" funds pending action as to their disposition by this Court.

IV.

The Remedy Prescribed by the Court Below Is Confiscatory and Unsupported by Law.*

The final basic issue presented by this case, as summarized at page 5, *supra,* relates to the question of the remedy for anti-trust violation.

Courts of equity are vested by Section 4 of the Sherman Act with jurisdiction:

> "* * * to prevent and restrain violations of the Act." (15 U. S. C. §4).

The courts have uniformly recognized that this jurisdiction is remedial and not punitive in nature. Its purpose is to restrain future violations of the Act and not to punish violations of the past.

> *U. S.* v. *American Can Co.,* 234 Fed. 1019 (D. Md.), appeal dismissed 256 U. S. 706;
> *U. S.* v. *Standard Oil Co.,* 173 Fed. 177, 190 (C. C. E. D. Mo.), mod. 221 U. S. 1;
> *U. S.* v. *United States Steel Corp.,* 223 Fed. 55, 59 (D. N. J.), aff'd 251 U. S. 417.

---

* The Hartford assignments of error here relevant are Nos. 3, 48, 72-99 and 102 (R. X, 7710 *et seq.*).

Equitable relief has never been confiscatory. It is constructive and is not destructive. As this Court held in *Standard Oil Co.* v. *U. S.*, 221 U. S. 1:

> "* * * one of the fundamental purposes of the statute is to protect, not to destroy, rights of property" (p. 78).

The judgment in the present case, however, departs from these fundamental principles. It is undoubtedly the most extraordinary decree that was ever entered in the history of the anti-trust laws. There is no decree that can serve as a precedent for its provisions. It does not merely terminate alleged illegal agreements and enjoin their resumption in the future. It confiscates the defendants' property, imposes public utility obligations, and deprives them in perpetuity of the liberty to carry on their business by acts which are not illegal *per se*, and which other members of the public, including their competitors, may employ. These acts are prohibited absolutely—not merely as part of a claimed illegal combination.

General Analysis of Judgment.

The judgment—like most other documents in this case—is very long and very complicated—covering 40 pages of the printed record (R. X, 7653-92). It has already been sketched very briefly in this brief, *supra*, at pp. 6-8. However, we believe that it will serve the convenience of the Court if we set forth again an outline of its principal provisions before proceeding to discuss it in detail.

The principal judgment provisions.

In the *first* place, after the usual formal adjudications that the anti-trust laws have been violated, the judgment enjoins the defendants from generally engaging in any prac-

tices hereafter having a "tendency" to continue or revive any of the violations "charged"—whether accurately or not—in the 71 printed pages of the Government complaint (Judgment, §9, R. X, 7660-1).

In the *second* place, the court has appointed a receiver to take over all the property of Hartford and to conduct its business—not merely pending this appeal—but indefinitely thereafter, until the court is "satisfied that there no longer remains a reasonable probability that the practices found illegal by it will be resumed" (Judgment, §§10-20, R. X, 7661-5).

In the *third* place, the judgment contains the following confiscatory provisions as to both Hartford and all the other defendants in the case:

1. All settlement and license contracts of Hartford are cancelled unconditionally (Judgment, §§27-28, R. X, 7670-2).
2. Existing patents are forfeited and become community property—through the expedient of requiring royalty-free licenses to all applicants until their expiration. In the case of Hartford this wipes out thirty years of research (Judgment, §24(a), R. X, 7667-8).
3. Future patents—patents yet unborn—are forfeited to the extent that their exclusive character is destroyed. They are subjected to compulsory licensing to all comers, in perpetuity, at reasonable royalties, to be fixed by the court (Judgment §24(b), R. X, 7667-8).
4. Hartford's machines—of great value—are forfeited—through the expedient of requiring their sale on confiscatory terms to Hartford's licensees. Thus a large part of Hartford's physical property is taken away (Judgment, §22, R. X, 7666).
5. The royalty income of Hartford currently paid by licensees is likewise forfeited—through the expe-

dient of requiring its return to the licensees (Judgment, §15, R. X, 7663-4).

6. Hartford's capital also is being forfeited—through the direction to the receiver to operate the company out of capital—resulting in a dissipation of capital assets at the rate of over $100,000 a month —over $1,200,000 a year (R. Op. Vol. 157; Judgment, §§11 and 15, R. X, 7661-4; Affidavit of F. Goodwin Smith, R. X, 7581).

In the *fourth* place, in so far as the defendant Hartford —or any of the other defendants—continues to engage hereafter in the business of selling either glass machinery or glassware, they are subjected to certain permanent obligations of a public utility nature, as follows:

1. They must license their machine patents and methods to everyone on identical terms (Judgment, §§24(b) and 29(f), R. X, 7667-8, 7672-3).

2. They must sell machinery to everyone—if they sell at all—without discrimination in any manner as to prices or terms, and without the right to select their customers (Judgment, §§23 and 25, R. X, 7666-7, 7668-9).

3. They must supply drawings and patterns of their machines to every licensee—which means anyone who may apply. Lynch alone is excepted from this requirement (Judgment, §24(c), R. X, 7667-8).

4. Similarly, in the sale of glassware, embodying any patented invention, they must not discriminate in the slightest manner between purchasers (Judgment, §29(f), R. X, 7672-3).

5. The same public utility obligation is applicable not only to glass machinery and glassware but to any machine or product of any nature whatsoever—which embodies a patented invention (Judgment, §29(f), R. X, 7672-3).

In the *fifth* place, the defendants are further deprived —absolutely—of the liberty to use any of the following normal and reasonable methods of carrying on business: the right to issue limited licenses under machine and process patents (Judgment, §29(a), R. X, 7672); to lease machinery (Judgment, §21, R. X, 7665-6); to acquire or hold stocks, bonds or assets of any other glass company or machinery company, even though the conditions are such that competition would not in any degree be affected (Judgment, §§33, 36, R. X, 7674-5, 7677-8); to interchange statistics or other data in trade association or other activities, with exceptions that are illusory (Judgment, §40, R. X, 7680-2); and to utilize normal, necessary and statutory Patent Office procedures (Judgment, §§51-54, R. X, 7686-90).

Finally, all defendants—individual and corporate—are subjected to perpetual supervision and surveillance by the court and by the Department of Justice as follows:

1. No defendant can make any contract with any other defendant without permission of the court—except contracts identical with contracts previously approved (Judgment, §31, R. X, 7673-4).
2. Disputes as to prices for machinery and failure to sell the same under the public utility requirements prescribed are to be passed upon by the court (Judgment, §§22 and 23, R. X, 7666-7).
3. The court is to determine the royalty rates on future patents (Judgment, §24, R. X, 7667-8).
4. The court must approve the election of officers to the industry trade association before they can take office (Judgment, §38, R. X, 7679).
5. The Department of Justice is accorded access in perpetuity to the corporate defendants' files (Judgment, §55, R. X, 7690-1).

The judgment defeats itself.

The court in its opinion indicated that it did not desire that Hartford should be dissolved. But this judgment does more than dissolve Hartford—it destroys it.

It takes away Hartford's patents—Hartford's machines—and Hartford's income. Hartford cannot even reserve its future patents to itself. It is compelled to furnish—on unknown terms to be fixed by the court—not only its future patents but also its know-how to any competing machine manufacturer or to anyone who wishes to manufacture his own machines. In short, the judgment not only takes away the means with which Hartford conducts its research, but also its incentive.

In the machine business—it destroys Hartford. And certainly the other defendants—who are in most instances subject to similar restrictions should they engage in that business—will scarcely desire to enter the machinery field under these handicaps.

In the glass business—and in the machine business—and in any other business—the judgment compels uniform prices and terms by all defendants on patented products with no possibility of deviation—thereby preventing rather than increasing competition. The situation will be precisely that which existed during the NRA, when manufacturers were compelled to publish prices and terms and adhere to them without deviation.

In short: This decree defeats itself. Instead of promoting competition it prevents it.

No adequate hearing was held.

It is apparent from the above that the judgment in this case prescribes an elaborate code, under which these defendants, corporate and individual, are regulated both

broadly and minutely, in their business affairs—not temporarily, but in perpetuity.

If this code had been prescribed by Congress, it would have been only after extensive hearings and debate.

Similarly, if this case had conformed to previous precedents, such as those laid down by this Court in the *American Tobacco* and other cases, defendants would have been allowed adequate time and opportunity to submit a form of decree, to offer testimony, if necessary, and to be heard on each of its provisions both as to substance and form.

Indeed in this case—when the defendants sought during the trial to introduce evidence on the question of the remedy—the District Court had indicated that they would be afforded opportunity to submit such testimony later. The court said:

> "If the Court should ultimately conclude that a conspiracy in restraint of trade existed, that there existed an illegal monopoly, does exist an illegal monopoly, created through illegal means, that that monopoly is in existence in restraint of trade, operating in restraint of trade, the Court might then come to the question of what should be done with the Hartford-Empire Company. That, it seems to me, is the time, through testimony to the Court or a Special Master appointed by the Court, for plans to be submitted and testimony offered on what course ought to be followed by the Court in effecting a remedy" (R. VII, 4963-4).

The Government approved this procedure (R. VII, 4959, 4961-2; R. IX, 6850).

Nevertheless, this procedure was not followed. After the opinion had been rendered, a form of judgment was prepared and submitted to the court by the Department of

Justice. The defendants were given no opportunity to prepare a form of judgment on their own behalf—or to offer evidence relating thereto.

The Government draft of judgment was submitted to the defendants on September 19, 1942. It covered over 40 pages with 60 long and complicated paragraphs. It was noticed for hearing as to form under District Court Rule 4, on October 1, 1942 (R. X, 7421; R. IX, 6876-7).

Hartford and the other corporate defendants were each allowed 30 minutes to discuss the entire judgment—30 seconds per paragraph—and three days thereafter to file objections (R. IX, 6879).

On October 8, 1942, the final judgment was handed down —with substantially no changes from the Department's draft, except relatively minor ones conceded by the Department at the hearing (compare proposed and final judgments, R. X, 7613-53 and 7653-92). See *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 296.

The judgment should be reversed.

We respectfully submit that in this case, of national importance, this Court should not affirm the provisions of this judgment.

The anti-trust laws prescribe their own remedies—and those remedies are exclusive. If this judgment stands, however, it will be a precedent for the right of any court in any case in equity arising under the anti-trust laws to prescribe what is in substance the sweeping forfeiture of property and the deprivation of ordinary civil rights. Its provisions take property without compensation; they deprive the defendants of liberty guaranteed by law; they subject the defendants to unreasonable searches and seizures, and impose cruel and unusual punishments.

Indeed this judgment is so extreme that, while complete analysis of its provisions is impossible within the limits of this brief, nevertheless we believe that some detailed discussion of illustrative paragraphs summarized above is absolutely essential to demonstrate the extraordinary penalties and forfeitures therein provided. This more detailed discussion accordingly follows:

Initial Provisions.

The initial injunction is hopelessly vague.

The judgment commences (passing over certain stereotyped provisions) with a general injunction against any practice having a *"tendency"* to continue or revive any violation charged in the Government's *"complaint"*. The language is as follows:

> "9. The defendants * * * are enjoined from monopolizing, attempting to monopolize, combining and conspiring to monopolize, or agreeing, combining, or conspiring to restrain trade as charged in the complaint herein in violation of the Sherman Anti-Trust Act and the Clayton Act and be and they hereby are enjoined from engaging in or participating in practices, contracts, relationships, or understandings, or claiming any rights thereunder, having a tendency to continue or revive any of the aforesaid violations of the Sherman Antitrust Act and the Clayton Act" (Judgment, §9, R. X, 7660-1).

This means that no defendant, no corporate officer, no employee or agent, may safely enter into a single business transaction in the future until he has carefully checked that transaction against the voluminous Government complaint herein, as interpreted by the huge record of this case. The Government complaint, however, covers 71 printed pages; the printed record on appeal alone covers 16,500

pages; and both deal with everything that Hartford has done during nearly thirty years of existence. The result will be that they will find few transactions which could not be interpreted as having in some manner a "tendency" to conflict with some one sentence or phrase of the Government complaint.

Under these circumstances we submit that it is utterly impossible for the defendants to know what acts would be thought to have a "tendency" to revive something that has been complained of. Surely the defendants should not be subjected to injunctions so vague that they can never tell when even the most normal and innocent act may be in violation of this decree. As this Court, speaking through Mr. Justice Holmes, said in *Swift & Co.* v. *U. S.*, 196 U. S. 375:

> "* * * we * * * are bound by the first principles of justice not to sanction a decree so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt" (p. 396).
>
> "The defendants ought to be informed as accurately as the case permits what they are forbidden to do" (p. 401).

This judgment is in direct violation of Section 19 of the Clayton Act (28 U. S. C. §383) and Section 65(d) of the Federal Rules of Civil Procedure. The latter—almost identical with the former—expressly provides that:

> "(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction * * * shall describe in reasonable detail, and *not by reference to the complaint* or other document, the act or acts sought to be restrained * * *".

Moreover, this provision makes effective—as a proper statement of the law—every charge made in the Government's complaint whether ultimately held unlawful or not. Even though a Hartford policy should be expressly upheld

by this Court it would still be forbidden by Section 9 of the judgment.

The Hartford Receivership is unnecessary and unauthorized.

The judgment, following its general prohibition of conduct treated in the Government complaint, provides for a Receiver to take over all of Hartford's assets and to conduct its entire business affairs (Judgment, §§10-20, R. X, 7661-5).

In the whole history of the anti-trust laws, we find no precedent for any such appointment. In a few instances where stock was to be disposed of under an anti-trust decree, trustees have been appointed to hold the stock, where it seemed probable that it must be held for a long time pending a suitable disposition. But in no anti-trust case that we have found has the court ever appointed a receiver to operate a going concern. The most that the court has done has been to indicate (as in the *Standard Oil* and *Tobacco* cases) that *if* a suitable decree were not submitted by the defendants within a reasonable period of months, the court *would* appoint a receiver, but none has ever been appointed.

The law was well summarized by the court in *United States* v. *Great Lakes Towing Co.*, 217 Fed. 656 (N. D. Ohio), as follows:

> "While receivership is clearly proper when necessary to effectuate dissolution (*Union Pacific* case, *supra; St. Louis Terminal* case, *supra*), it is not always necessary even in such case, and should not be resorted to except where necessary. In none of the Anti-Trust cases to which we have referred does there appear to have been actual receivership" (p. 659).

In this case the receivership was obviously unnecessary. Here the defendants were not even given an opportunity

to submit a plan for relief—an opportunity always afforded in anti-trust cases to defendants in such circumstances.

In fact Hartford had already given substantial relief of the nature sought by the Government—by cancelling the various limitation clauses in its licenses and by taking other substantial action to meet the Government's criticisms.

If anything further were necessary—to preserve the *status quo*—a simple injunction punishable by contempt would have sufficed.

Nor can it be argued that the receivership was necessary to prevent the distribution of the assets of the company in dividends or otherwise pending the appeal. That, too, could have been achieved by a simple injunction which would unquestionably have been obeyed.

For a court to take over the actual management of an operating company such as Hartford—refusing any stay whatever, even pending appeal (Order, R. X, 7613)—is a step so inappropriate and drastic that we submit it should not be permitted to continue against these defendants nor to stand as a precedent to be followed in the future.

Moreover, the Receiver in this case, on the one hand, has been ordered to continue to operate the business of the company as usual—while, on the other hand, the income of the company (namely, the royalties received from leased machinery) has been impounded and earmarked for eventual return to the licensees, in case this Court affirms the judgment of the court below. Thus, in substance, the receivership has resulted in a partial liquidation of the company through the dissipation of its capital assets for the benefit of the licensees.

Hartford has vigorously objected to the imposition of this receivership (R. X, 7581-2. See also 7514, 7526-9, 7535-51), but its objections have been overruled (R. X, 7611-13).

In addition, in view of the fact that Hartford is required by the judgment to deal with all customers upon an equal basis—and the further fact that the receivership is to continue indefinitely—the Receiver, by reason of the decisions he makes with respect to the ordinary business affairs of the company, and with respect to the execution of contracts which will bind Hartford in the future, will be able to set the pattern of Hartford's business—if any—for many years to come.

Forfeiture Provisions.

The judgment, following the above described injunctive and receivership provisions, imposes forfeiture penalties of devastating scope. These forfeitures may be summarized as follows:

Forfeiture of contracts is ordered.

All settlement and license agreements between Hartford and its licensees are to be cancelled forthwith. It is not clear what—if any—other arrangements can be entered into to take their place. In any event, they will have to be negotiated hereafter and entered into with the consent of the court (Judgment, §§27, 28 and 31, R. X, 7670-2, 7673-4).

As previously set forth, most of the things of which the Government complained had ceased to exist before this suit was brought. Moreover, whatever the origin of the Hartford license agreements may have been, nevertheless—at the time of this judgment and for more than two years previously—they had been *non-exclusive and free of limitations*. It is submitted that these agreements should have been allowed to stand as not illegal *per se*. Or if they contained any clauses to which the court could properly object,

such provisions could easily have been eliminated without terminating the entire agreements.

Forfeiture of patents is ordered.

All existing patents of Hartford—and all patents that may issue on existing applications for patents—relating to machines or methods used in the manufacture of glassware, are confiscated. That is not the word used in the judgment but since the patents must be licensed royalty-free to anyone who applies, that is the actual result.

Nor is this forfeiture peculiar to Hartford. The same forfeiture is prescribed for the patents of all other defendants—individual as well as corporate.

The judgment provides:

> "24. The defendant Hartford-Empire Company and * * * [the other defendants] shall * * *:
>
> (a) agree to license without royalty or charge of any kind and for the life of the patents any applicant to make, to have made for it, and to use any number of machines and methods used in the manufacture of glassware and embodying inventions covered by any patents or patent applications now owned or controlled by each of such defendants * * * " (Judgment, §24(a), R. X, 7667-8).

To complete the confiscation the defendants are enjoined from bringing suit for the infringement of any such patents until further order of the court (Judgment, §26, R. X, 7669-70).

In the case of Hartford this means the confiscation of patents which are the result of thirty years of research, at an expense of millions of dollars (Stip., Ex. H-6152, R. XII, 8595). This requirement is not merely temporary—it is perpetual—the patents are unconditionally gone.

Moreover, this confiscation does not apply merely to such patents as may have been acquired—allegedly—in violation of law. It applies to all patents relating to glass making machines and methods. Thus every patent of Hartford is to be confiscated even though resulting from its own thirty years of independent research.

Even if some patent acquisitions had been unlawful, which we deny, the maximum relief—either necessary or proper—should not be forfeiture of all of Hartford's patents but rather should consist of appropriate action with respect to such patents as may have been improperly acquired by Hartford. If it be held that the continued ownership by Hartford of any acquired patents is improper—which we urge is not the fact—Hartford would be willing to dedicate these acquired patents to the public or to agree not thereafter to enforce them against others.

In no event should Hartford or any of the other defendants be stripped of inventions which are the result purely of its own research.

Forfeiture of future patents is ordered.

The court below was not content with confiscating existing patents.

It went on to confiscate—in a very real sense—patents yet unborn—patents which will be applied for and issued only after this—alleged—conspiracy has long since terminated.

Again this is not done directly but is done effectually, nevertheless, by providing that such future patents shall be subject to compulsory licensing to all applicants on the same terms at "reasonable royalties" to be fixed by the court. The "exclusive" right to future patents is thus totally destroyed. The exact language of the judgment is as follows:

"24. The defendant Hartford-Empire Company and * * * [the other defendants] shall * * * :

(b) agree to license, at a reasonable royalty, any applicant to make, have made for it, and to use any number of machines and methods used in the manufacture of glassware and embodying inventions covered by any patents granted on patent applications filed subsequent to the date of this judgment, and then owned or controlled by each of such defendants * * *.

"If any dispute arises between any applicant for a license or licensee and any defendant under * * * this paragraph 24, such dispute shall be determined by this Court on petition by either such applicant or licensee or the defendant involved, on thirty (30) days' notice to the other party to the dispute and to the Attorney General of the United States" (Judgment, §24, R. X, 7667-8).

Here again the confiscation is not temporary or conditional. It is perpetual and continues throughout the lives of the individual defendants and the future existence of the corporations.

We know of no principle by which such a provision can be defended and none was offered in the opinion of the court below.

It has been said in many cases that patents are property and that patent property can no more be confiscated than property of any other nature. *Solomons* v. *United States,* 137 U. S. 342, 346, and other cases *infra,* pp. 150-51.

If patents can be confiscated, then logically such confiscation can be extended to all other property of the defendants—plants, machinery, bank accounts, etc.

In fact, as we shall see, the court below did measurably so extend it.

Forfeiture of machinery is ordered.

A very substantial part of Hartford's assets consists of machinery (R. II, 1481; Stip., Ex. H-5002, R. XII, 8533). This machinery is confiscated for practical purposes by means of a provision ordering the Receiver to sell all leased machinery to its lessees at reasonable prices after "taking into consideration" past royalties, rental and license fees paid by the lessees. The judgment provides:

> "22. The defendant Hartford-Empire Company and * * * its Receiver shall offer, in writing, to sell to each of the respective lessees in possession thereof, all the machinery used in the manufacture of glassware owned by Hartford-Empire Company and now under lease by it to such lessee, at reasonable prices, provided that in determining what shall be considered a reasonable price, there shall be taken into consideration the license or other rental fee heretofore paid to Hartford-Empire Company by such lessee, and the royalties, if any, heretofore paid to Hartford-Empire Company for the use of the inventions embodied in said machinery" (Judgment, §22, R. X, 7666).

The net of this provision is that the machines which Hartford owns are confiscated as well as its patents. Its inventions are far more valuable than the physical machinery in which they are embodied. Consequently, when the machines are sold at a price reflecting the value of the physical machines, after "taking into consideration" past rental, royalties and license fees—minus any value for the patents they embody—the court is really confiscating these machines.

These machines—it should be noted—are not only confiscated from Hartford; they are simultaneously given to licensees who in many cases are defendants herein and

thus are in *pari delicto*—according to the judgment of the court below.

Hartford is also forbidden by Section 26 (b) of the judgment from attempting to repossess its machinery. Apparently this prohibition against repossession would be applicable even if the lessees refused to buy. Accordingly, under the theory of this judgment anyone who violates the anti-trust law becomes an outlaw—his property subject to spoliation by anyone who chooses to seize it and he himself left powerless to prevent trespass or bring possessory action.

Forfeiture of income is ordered.

The Receiver, under another forfeiture provision, is ordered to earmark the royalty income of Hartford and to return the same to the Hartford licensees after this appeal. The judgment provides:

> "15. * * * any and all receipts by the Receiver from licensees of royalties derived from the licensing of inventions embodied in methods or machinery used in the manufacture of glassware, whether or not such royalties are paid under contracts, are to be set aside and specially ear-marked as coming from each licensee. If no appeal from this judgment is taken by Hartford-Empire Company, or if an appeal is taken and the judgment is confirmed by the Supreme Court, each of such ear-marked receipts so collected and set aside is to be returned, without interest, to each of the licensees who shall have, or has, paid them to the Receiver, less any amounts paid out by the Receiver for the benefit of any such licensee and properly chargeable and allocable to any such licensee" (Judgment, §15, R. X, 7663-4).

These provisions continue the dismemberment of Hartford. First its contract rights, then its patents, then its machinery, and now its income is confiscated.

The injustice of this provision of the judgment is heightened by other action taken by the District Court. The court in its opinion directed the Receiver—

> "to take over the management of Hartford and continue to operate under the present contracts and agreements of Hartford in its licensing and lease system" (R. Op. Vol. 157).

Pursuant to these directions, the Receiver has continued to carry out the old agreements of Hartford and to carry on the Hartford business precisely as before. The expenses of the Company thereby incurred—formerly paid out of royalties—are now paid out of Hartford's capital. In this manner the receivership—far from preserving the *status quo*—has actually resulted in a compulsory dissipation—by the Receiver—of Hartford's capital at the rate of "over $100,000 a month" (Affidavit of F. Goodwin Smith, R. X, 7581).

In short Hartford's Receiver under the judgment continues to give to the lessees the use of machines which are Hartford's own property and to extend to the lessees the benefit of Hartford's research and service. But if as a result of this appeal the judgment below is affirmed, the judgment provides that the lessees will have received these benefits without having to pay for them.*

We submit that it is inequitable that the lease-license contracts should be enforced unilaterally—against Hartford but not against its licensees. Why should Hartford perform under its license contracts, while the royalty payments for that performance are returned to the lessees? Such an arrangement is completely lacking in mutuality. The use of this property has been of great value to the licensees. Surely the licensees are not entitled to the profits

---

* The proviso in Section 15, namely "less any amounts paid out by the receiver for the benefit of any such licensee and properly allocable to any such licensee" is so vague as to be illusory.

from this use—royalty free—as a windfall at the expense of Hartford.

Only a very compelling reason could justify such an inequitable result. The license contracts are not illegal *per se.* They are merely *non-exclusive, unrestricted* agreements—for the most part leases of Hartford's own property. The licensees here before this Court are not denying their obligation under the licenses—but on the contrary are here insisting that the licenses are legal.

We strongly urge that there is present here no such compelling reason necessitating the forfeiture of Hartford's royalty income. The public is interested only in the prevention of future restraints. The retention by Hartford of the royalties—which have already been paid by the licensees—would not effect any such restraints. Nor is it to be presumed that the court—in continuing to conduct the operations of Hartford by its Receiver—has been restraining trade. There is no public advantage to be gained by giving the licensees a royalty-free windfall.

The payment by the licensees of their stipulated royalties during this period in the last analysis is only an appropriate part of the preservation of the *status quo* pending an appeal. A court of equity surely has power to mould its relief in such a manner as to do justice to the licensor during the maintenance of that *status quo.*

Here changes were made by Hartford in the licenses prior to the testimony in this case which—even if not sufficient to render the case entirely moot—are at least sufficient to justify the Court in the exercise of its powers of equity to permit Hartford to retain the royalties paid thereunder.

The Court, if it should deprive Hartford of these royalties, would be going out of its way to seize sums which have already been paid under contracts which Hartford is being affirmatively compelled to carry out.

The Hazel-Atlas impounding order.

In addition to providing for the earmarking of Hartford's royalty income—collected subsequent to the receivership established by the judgment—the judgment continued a previous interlocutory impounding order which had been entered during the trial of the case (Judgment, §46, R. X, 7684). This previous order required the payment into court of all royalties due from Hazel-Atlas to Hartford under the Hazel-Atlas non-exclusive license agreement of 1932—and the simultaneous payment into court by Hartford of the moneys due from Hartford to Hazel-Atlas under the same agreement (Impounding Order, R. I, 519-21).

No provision has ever been made for the final disposition of these funds. That question was reserved for the future action of the court. Under this order a substantial amount of money had been paid to the clerk of the court prior to the entry of the final judgment.

Under the normal operation of the Hartford-Hazel-Atlas contract, neither party was required to pay net thereunder an amount greater than (1) the sum it owed to the other *less* (2) the sum owing from the other to it (Ex. 142, §§3 and 6, R. XII, 8767-70; Impounding Finding 16, R. I, 517). The terms of the court's order, however, required each party to pay in full—without any deduction for amounts owing from the other party—or in other words necessitated *substantial duplicate* payments (Impounding Order, §§2 and 3, R. I, 519-20). The order was therefore clearly erroneous.

Forfeiture of cash assets.

We have already explained that the Hartford Receiver was directed by the District Court, in its opinion, to "continue to operate under the present contracts and agree-

ments of Hartford" (R. Op. Vol. 157), and that this—by reason of the fact that Hartford's royalty income was confiscated—has resulted in the operation of Hartford at a net loss of approximately $100,000 a month (Affidavit of F. Goodwin Smith, R. IX, 7581).

Accordingly, the Receiver is currently operating out of Hartford's capital assets—thereby dissipating those assets at a rate of over $1,200,000 a year.

In other words, the District Court theoretically appointed the Receiver to "conserve the assets of Hartford and to preserve the *status quo*" (R. Op. Vol. 157). Actually the result has been not to preserve the *status quo*, but to effect a gradual liquidation of Hartford, and, if continued, to effect the complete destruction of Hartford.

The forfeiture provisions are not justified by B. B. Chemical and Morton Salt cases.

It is not clear on what legal theory most of these various forfeiture provisions were based. We know of no precedent by which they can be supported.

With respect to the forfeiture of existing patents, however, the Government below cited the cases of *Morton Salt Co.* v. *The G. S. Suppiger Co.*, 314 U. S. 488, and *B. B. Chemical Co.* v. *Ellis*, 314 U. S 495.

We submit that it should be made clear—in this case of national importance—that those cases do not stand for any such doctrine of forfeiture—nor indeed for any affirmative imposition of obligations or penalties upon patentees.

As we understand it, the doctrine of those cases—and of similar cases following them—is merely the negative one that a court of equity may refuse to give aid to the use of a patent in such a way as to promote the sale of unpatented materials used in conjunction with the patented article or process.

This Court in both of those cases recognized that at some point, when misuse of the patents has ceased, the patents are again enforceable.

Thus in *Morton Salt Co.* v. *The G. S. Suppiger Co.*, 314 U. S. 488, this Court denied equitable relief only——

> "• • • until it is made to appear that the improper practice has been abandoned and that the consequences of the misuse of the patent have been dissipated" (p. 493).

Further in *B. B. Chemical Co.* v. *Elmer A. Ellis*, 314 U. S. 495, this Court expressly acknowledged that:

> "It will be appropriate to consider petitioner's right to relief when it is able to show that it has fully abandoned its present method of restraining competition in the sale of unpatented articles and that the consequences of that practice have been fully dissipated" (p. 498).

The *Chemical* and *Salt* cases, in other words, are mere applications of the equitable doctrine of "clean hands". The cases did not destroy or confiscate property—and said as much.

Patents, like physical objects, are property and entitled to the same protection as any other property:

Seymour v. *Osborne*, 11 Wall. 516:

> "Inventions secured by letters patent are property in the holder of the patent, and as such are as much entitled to protection as any other property • • •" (p. 533).

Cammeyer v. *Newton*, 94 U. S. 225:

> "• • • the rule of law is well settled, that an invention so secured [by patent] is property in the holder of the patent, and that as such the right of the holder is as much entitled to protection as any other property • • •" (p. 226).

Accordingly, this Court has repeatedly held that the Government has no more right to appropriate or confiscate patent property for public use without just compensation than any other property:

James v. *Campbell*, 104 U. S. 356:

> "That the government of the United States when it grants letters-patent for a new invention or discovery in the arts, confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser, we have no doubt" (pp. 357-8).

Hollister v. *Benedict & Burnham Manufacturing Company*, 113 U. S. 59:

> "* * * the right of the patentee * * * stood on the footing of all other property, the right to which was secured, as against the government, by the constitutional guaranty which prohibits the taking of private property for public use without compensation * * *" (p. 67).

Solomons v. *United States*, 137 U. S. 342:

> "The government has no more power to appropriate a man's property invested in a patent than it has to take his property invested in real estate" (p. 346).

In *William Cramp & Sons Ship & Engine Building Company* v. *International Curtis Machine Turbine Company*, 246 U. S. 28, this Court emphasized:

> "* * * That rights secured under the grant of letters patent by the United States were property and protected by the guarantees of the Constitution and not subject therefore to be appropriated even for public use without adequate compensation" (pp. 39-40).

Indeed the courts have expressly ruled—on this very issue of patent confiscation—adversely to the argument of the Government below. The courts have flatly denied that the *Carbice, Chemical* and *Salt* cases authorize punishment of anti-trust violation by confiscation of patent or any other property. They warn that they will not aid the patentee who abuses his patent in the manner indicated so long as this abuse continues, but they just as clearly rule that they will subsequently recognize and enforce the patent as valid when the abuse ceases.

To quote from a few representative cases:

American Lecithin Co. v. *Warfield Co.*, 105 F. (2d) 207 (C. C. A. 7th), certiorari denied 308 U. S. 609:

> "We believe that in the Carbice case the Supreme Court held that the patentee may not use his patent to monopolize unpatented supplies. • • • *We cannot believe that the Supreme Court meant to penalize the patentee by destroying his patent*" (p. 211).

Novadel-Agene Corp v. *Frederic H. Penn*, 119 F. (2d) 764 (C. C. A. 5th), certiorari denied 314 U. S. 645:

> "The 'improper use' or 'unclean hands' doctrine was clearly stated by the Supreme Court in *Carbice Corporation of America* v. *American Patents Development Corporation*, 283 U. S. 27, 31 • • •
>
> "Improper use does not invalidate a patent, but the courts will not assist an offending patent owner against persons who infringe the patent while such improper practices continue. Improper use does not invest an infringer with a license for the life of the patent, for *if a patent owner purges himself of the improper business practices he may then enforce his patent and recover damages for infringement occurring thereafter*" (pp. 766-7).

Sylvania Industrial Corp. v. *Visking Corp.*, 132 F. (2d) 947 (C. C. A. 4th):

> "While equity should withhold its assistance from the owner of a patent, who uses it to restrain competition in the sale of unpatented articles, by declining to entertain a suit for infringement, *relief may be afforded when it clearly appears that the improper practice has been fully abandoned and the consequences of the misuse of the patent have been dissipated. B. B. Chemical Co.* v. *Ellis,* 314 U. S. 495, 498; *Morton Salt Co.* v. *G. S. Suppiger Co.,* 314 U. S. 488, 493" (p. 958).

In *Universal Sewer Pipe Corp.* v. *General Const. Co.,* 42 F. Supp. 132 (N. D. Ohio, E. D.) a plaintiff patentee, who had been using his patent to promote the sale of unpatented articles, ceased that practice after the commencement of suit (somewhat as Hartford's limited licenses were discontinued after the filing of the complaint but before trial). Thereupon the court held the patent rights of the plaintiff patentee to be valid and enforceable:

> "* * * the court concludes that the plaintiffs are entitled to relief by way of injunction, provided, however, that the plaintiffs, in their operations under their patent, stay within the limits of the monopoly granted by the patent" (p. 134).

In other words the courts have interpreted the *Carbice, Chemical* and *Salt* cases in conformity with the ruling of this Court in *Peoria Gas and Electric Company* v. *Peoria,* 200 U. S. 48, wherein it was held that:

> "Parties making an agreement, unlawful by the anti-trust act, may while the agreement is in force be subject to its penalties, but whenever they cease to act under it the penalties also cease. The punishment adheres to the offense and stops when the offense itself stops" (p. 56).

Note that President Roosevelt in his Message to Congress of April 29, 1938, in suggesting as statutory amend-

ments certain of the theories of patent and anti-trust law now appearing in the instant judgment, was careful to state that:

> "Of course, such amendment should not deprive the inventor of his royalty rights * * *."

This Court in the recent anti-trust cases of *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, and *United States* v. *Univis Lens Co., Inc.,* 316 U. S. 241, decided respectively before and after the *Chemical* and *Salt* decisions, carefully refrained from ordering confiscation of the patents there involved.

A fortiori, the court should not apply any affirmative doctrine of forfeiture and confiscation to future patents of the defendants—inventions still unborn—which have had nothing whatever to do with the matters here in question. Nor should it affirmatively strip the defendants of machinery and of moneys.

In summary, an attempt is being made in this case to extend the "clean hands" doctrine far beyond the *mere refusal of judicial assistance* to a patentee in an infringement suit—and to make it into an *affirmative instrument of confiscation* in proceedings brought by the Government. The object is affirmatively to confiscate the property of anyone charged with violating the anti-trust laws—not only patents which have been acquired from others but patents which are the result of the defendant's own efforts—and *future patents which could never by any possibility be regarded as having been misused.* An attempt is being made to extend the confiscation not only to patents—whose validity is not questioned—but to other property as well.

In view of the manner in which—by sweeping and imaginative charges of conspiracy and combination—anything

that any defendant may possess can conceivably be treated as one of the instrumentalities employed in a conspiracy—it is easy to see that such an extension of the doctrine of "clean hands" would lead to the most appalling consequences.

The forfeiture provisions are opposed to public policy.

We respectfully submit that any confiscation of patent or other property for violation of the anti-trust laws, through an extension of the above described "clean hands" doctrine, would clearly be against public policy.

It would be impossible to overestimate the serious effect of such a doctrine upon research organizations, large and small, which have contributed in the highest degree to the progress of recent years. Practically every one of the prominent research organizations has been investigated recently. Most of them have at some time been charged with acts in violation of the anti-trust laws.

If all the fruits of their years of research are to be swept away because they may have in some manner violated the anti-trust laws, then not only will they have suffered losses so great as to stagger the imagination—but the incentive for research created by the patent laws will have been destroyed.

The harshness of this rule is all the more apparent when one contemplates the extreme difficulty of determining what constitutes a violation of the anti-trust law. The law itself, as this court has recently said in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 489, is decidedly vague in its language; and it could hardly be denied that its interpretation has shifted with the passage of the years. The decisions of the appellate courts have practically always been divided, and in a very large proportion of the cases they have reversed the decisions of the courts below.

The courts in turn have by no means always agreed with the interpretation of the law by the administrative authorities.

The Department of Justice itself has been frank to admit the impossibility of determining in advance the proper meaning of the anti-trust laws. No one could have stated this more sincerely or more effectively than Mr. Justice Jackson himself did some years ago in his article in the Pennsylvania Law Review (*Monopolies and the Courts,* by Jackson and Dumbauld, 86 U. Pa. L. Rev. 231), in which he said:

> "In view of the extreme uncertainty which prevails as a result of these vague and conflicting adjudications, it is impossible for a lawyer to determine what business conduct will be pronounced lawful or unlawful by the courts. This situation is equally embarrassing to business men wishing to obey the law and to government officials attempting to enforce it" (p. 232).

Mr. Thurman Arnold, the Assistant Attorney General under whose jurisdiction this case was initiated, has said the same thing (Trade and Commerce Bar Association address delivered April 28, 1938) as follows:

> "In discussing this problem I am going to be as definite and as explicit as I can. However, I know that you all realize that anti-trust policy touches fields and boundaries which recede as you approach them and disappear each time you try to stake them out. Definiteness and precision in this area have been impossible even for the courts".

In a case where it is impossible even for the Government itself—much less for businessmen—to tell with certainty what may or may not lawfully be done, surely cruel and confiscatory punishments ought not to be applied. The

harshness of such a rule is all the more apparent in this particular case because in substance it is an *ex post facto* punishment. The courts, up until the District Court's opinion herein, had sustained the validity of actions by patentees of the nature here involved, including the acquisition of non-competing patents and the issue of limited licenses. Similarly the courts had held that punishment for anti-trust violation did not include confiscation of patents or other property.

Surely such a change or repeal of existing law (to paraphrase the language of this Court in *McClurg* v. *Kingsland,* 1 How. 202, 206, with respect to a legislative amendment to the patent laws), should not be permitted to impair the existing property rights of patentees.

As emphasized many years ago by Lord Kenyon in *Rex* v. *Younger* [1793] 5 T. R. 449, 101 Eng. Reprint 253:

> "It would be cruel not only to the defendant, but also to those in a similar situation with him, if we were now to punish him for doing that which this court publicly declared so many years ago might be done with impunity, and which so many persons have been doing weekly for such a number of years" (p. 450).

This Court has only recently recognized that judicial rulings, even though considered unsatisfactory in the light of modern trends of thought, should nevertheless be respected where undue hardship would otherwise result.

In *Helvering* v. *Griffiths,* 318 U. S. 371, this Court, in refusing to reverse a former decision, frankly stated that:

> "* * * a long period of accommodations to an older decision sometimes requires us to adhere to an unsatisfactory rule to avoid unfortunate practical results from a change. * * * We think this another example of the same principle" (p. 403).

We believe that it is most significant that Congress has repeatedly been asked to enact bills to provide patent forfeiture for anti-trust violations, and has as repeatedly declined to act. See e.g. the Campbell Bill of 1908, H. R. 20388 of the 60th Congress; Campbell Bill of 1914, H. R. 14865 of the 63rd Congress; Dill Bill of 1928, S. 2783 of the 70th Congress; and O'Mahoney Bill of 1942, S. 2491 of the 77th Congress.

Public Utility Provisions.

The judgment below not only results in sweeping forfeitures, as above set forth; it also in substance converts much of the glass machinery and glassware industry into a public utility industry.

Defendants—when engaging in the glass machinery business—must sell machinery to all applicants without discrimination as to price or terms. Similarly defendants must license all to use their glass machinery and method patents under uniform terms. They cannot, as normal persons can, select their customers in such a business.

Furthermore, defendants cannot—either in the glass machinery or in the glassware or in any other business—when selling or distributing any patented article whatever—use any of the many and legitimate variations in price which recognize differences in conditions or permit the meeting of competition—which, indeed, constitute the heart of competition. They cannot even grant patent licenses in any business whatever which contain different provisions,—if thereby one licensee is in some manner preferred over another.

The effect of these provisions is not—as the court below seems to assume—to promote competition. On the contrary, it is to put the defendants in a straitjacket and to

destroy both the possibility and the incentive to compete. The way in which these results are accomplished by the judgment is as follows:

Compulsory dealing with all is ordered.

In the first place, the judgment requires compulsory dealing with all applicants as to machinery matters. The defendants are ordered to—

(a) *Machines:*

> "• • • offer and continue to offer to sell such machinery to *any applicant* (including, but not limited to, those not heretofore engaged in the manufacture of glassware) at reasonable and equal prices and upon reasonable and equal terms and conditions of sale to each applicant, provided that said sales are not hereby required to be made to any applicant not having a proper credit rating unless said applicant offers to pay cash; • • •" (Judgment, §23, R. X, 7666-7).

(b) *Patents:*

> "• • • agree to license, at a reasonable royalty, *any applicant* to make, have made for it, and to use any number of machines and methods used in the manufacture of glassware and embodying inventions covered by any patents granted on patent applications filed subsequent to the date of this judgment, and then owned or controlled by each of such defendants" (Judgment, §24(b), R. X, 7667-8).*

(c) *Drawings and patterns:*

> "• • • agree to make available to *any licensee* • • • [this means anyone] a copy (at a cost not to exceed the cost of preparing the copy plus a reasonable

* The confiscatory aspect of this provision has been previously treated at pp. 142-143, *supra*.

> profit), of any and all drawings and patterns owned or controlled by the respective defendant relating to the machinery or methods used in the manufacture of glassware embodying licensed inventions * * *" (Judgment, §24(c), R. X, 7667-8).

These above quoted provisions, it will be noted, are not limited to any period of time in which the defendants are claimed to be acting in violation of law—nor are they limited to any property so used. They are absolute and extend in perpetuity. They impose upon both the corporate and the individual defendants, forever, disabilities not imposed upon the public generally—and particularly not imposed on their competitors.

The compulsory sale of machines applies to all machines —even machines which are not and never have been patented—and will continue forever—after every patent has expired.

The defendants are not only compelled to deal with all applicants—they may not even fix the sales price, because in the end the court reserves to itself the power to fix prices (Judgment, §§23 and 24, R. X, 7666-8).

These provisions are in direct conflict with the fundamental right of private business to select its own customers. As so aptly stated in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46, 49 (C. C. A. 2):

> "Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton

> Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the Government" (p. 49).

Particularly shocking is the provision, above quoted, requiring a research organization such as Hartford to disclose all of its drawings and patterns relating to glassware manufacture to all—even competitors. Moreover the judgment is so ambiguous it may possibly be interpreted to require the handing over of working papers relating not only to commercial models of machines—but to machines constituting improvements upon commercial models, thus including experimental models built for research purposes only. What incentive is there left for any research, if the research staff is required to turn over such trade secrets to competitors?

This provision for the compulsory disclosure of trade secrets is clearly unconstitutional under the ruling in *United States* v. *Basic Products Co.*, 260 Fed. 472 (W. D. Penn.), wherein it was held that such a compulsory disclosure constituted:

> "• • • a contemplated search and seizure, and a contemplated taking of private property for public use, without due process of law, which are violate of the Fourth and Fifth Amendments of the Constitution" (p. 482).

Trade secrets, as this Court ruled in *Board of Trade* v. *Christie Grain and Stock Company*, 198 U. S. 236, unconditionally belong to the owner thereof, who—

> "• • • has the right to keep the work which it has done, or paid for doing, to itself" (p. 250).

Rigid price uniformity is ordered.

In the second place, the public utility provisions of the judgment not only strip the defendants of their right to select their own glass machinery customers, as above described; they also compel them—as in the case of public utilities—to deal with their customers upon the same prices and terms. The judgment expressly prohibits all defendants—corporate and individual—hereafter to enter into any agreement which—

(a) *Machinery:*

"• • • [results in] *discriminating, by* • • • exclusive requirement contracts • • • *or otherwise,* against any manufacturer of glassware, present or prospective, in the filling of orders for such machinery on the basis of the size of the order, the credit position of the customer (providing the customer pays cash), his standing in the industry *or otherwise*" (Judgment, §25, R. X, 7668-9).

(b) *Patents and products embodying patents:*

"• • • grants to any licensee, lessee or vendee of any product, machine, or equipment, when such product, machine or equipment embodies inventions covered by patents or patent applications owned or controlled by it or him, a *preferential position,* whether by means of lower rates of royalty, by *different* provisions of licensing, leasing, or sale, by exclusive licenses, rebates, discounts, a share in net or gross income or any part thereof, *or by any other* means" (Judgment, §29(f), R. X, 7672-3).

This last provision

applies in perpetuity;

applies to every defendant, individual or corporate;

applies not only to glassware or glass making machinery embodying a patent but to every kind of

product embodying a patent or an application for a patent—thus going far beyond the issues of this case or any patent or other business involved here;

applies to simple sales of any such commodity;

prohibits broadly *"different"* provisions to different vendees, lessees or licensees;

prohibits any arrangement for "sharing the income" of a business; and finally,

prohibits giving anyone a "preferential position" "by any * * * means"—whatever "preferential position" may signify.

These extraordinary provisions outdo the Robinson-Patman Act (15 U. S. C. §13). They require equal treatment of all customers. And they do so without any of the saving limitations and justifications which alone render the Robinson-Patman Act reasonable and constitutional. For example, under these paragraphs any defendant is forbidden for the rest of his life to sell a patented product of any nature at "different" prices to different customers, even though compelled to do so to meet competition. Apparently he could not even give quantity discounts, dealers' differentials, or distinguish between spot and contract sales.

Statutes containing such rigid anti-discrimination provisions have repeatedly been held unconstitutional. *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1, and *Williams* v. *Standard Oil Co.,* 278 U. S. 235.

We draw particular attention to the words "by any other means" and "or otherwise", which make the prohibitions hopelessly vague. This Court thus ruled in *Swift & Company* v. *United States,* 196 U. S. 375, as follows:

"The general words of the injunction 'or by any other method or device, the purpose and effect of

> which is to restrain commerce as aforesaid', should be stricken out. The defendants ought to be informed as accurately as the case permits what they are forbidden to do" (p. 401).

The requirement of rigid uniformity in the sales price of any "product," when embodying any invention of a defendant (Judgment, §29 (f)), will have particularly unfortunate consequences. There is great likelihood that in the near future new inventions in glass chemistry and structure will be embodied in glass containers, and may indeed be useful in many fields outside the glass industry—such as textiles, plastics and metallurgy. The result will be that the defendants who use these inventions, not only in the glass container field but in all other fields, will be required to adhere with rigid uniformity to their published prices, without deviations to meet competition, or to reflect savings in cost or to provide functional discounts.

The judgment also provides for a further freezing of competition in machinery—by forbidding changes in price even to meet changing conditions, except after a 30-day notice—during which time competitors are free to take the business away at lower prices (Judgment, §23, R. X, 7666-7).

Finally—as previously mentioned—the judgment even denies to the defendants the right to fix their own prices for their patents, their machines, their patterns and trade secret property. All prices thereon, if objected to by the buyer—and what buyer does not object to prices—are to be subject in perpetuity to the approval of the court (Judgment, §§23 and 24, R. X, 7666-8).

Thus the District Court completes the conversion into a public utility of the glass machinery industry and (so far as its products embody patents) the glass industry. Com-

petitive forces no longer determine prices or terms; the District Court, acting as a super-commission, takes over the management of the industry and dictates how it shall be run.

This is all the more unprecedented in view of the fact that there has never been any proof—or even any charge—that any of the defendants were discriminating in the prices of glassware—much less commodities generally.

In short, the judgment completely departs from *United States* v. *Colgate & Company,* 250 U. S. 300, wherein this Court held:

> "The purpose of the Sherman Act is • • • to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal" (p. 307).

The prohibitions of the judgment are absolute. The acts are prohibited as illegal *per se* and not merely when used as part of an alleged illegal combination.

Miscellaneous Prohibitions.

The judgment, in addition to its sweeping forfeiture and public utility provisions, further orders the forfeiture of specifically named rights customarily exercised by American industry.

We will mention briefly a few of these:

Leasing is prohibited.

Section 21 of the instant judgment prohibits all "leasing" of glassware machinery by corporate or individual

defendants (Judgment, §21, R. X, 7665-6). The Court has permitted no qualification of this arbitrary prohibition—which applies in perpetuity regardless of any effect on competition.

A rigid prohibition of this nature cannot be justified. Leasing is not illegal *per se*, even when exercised pursuant to a patent licensing policy. *United States* v. *United Shoe Machinery Co.*, 222 Fed. 349, 352 (D. Mass.), aff'd 247 U. S. 32. And the mere fact that defendants are claimed to have entered into leasing contracts in violation of the anti-trust laws—which we deny—does not forfeit forever their right to lease in the future.

As stated in *United States* v. *Standard Oil Co.*, 173 Fed. 177 (C. C. E. D. Mo. 1909), mod. 221 U. S. 1:

> "Past unlawful competition does not deprive parties of their right to conduct lawful competition" (p. 192).

Limited and exclusive licensing is prohibited.

Section 29(a) of the judgment prohibits limited licensing by corporate or individual defendants under machine or process patents (Judgment, §29(a), R. X, 7672). This prohibition applies "whether glassware * * * or any other product whatsoever" is involved. Section 30 is to similar effect.

Section 29(f) then goes further and prohibits licensing of any nature by the defendants which prefers one licensee to another, whether under machine or product patents (Judgment, §29(f), R. X, 7672-3). Even exclusive licenses are barred.

Such prohibitions go far beyond the issues of this case. These sweeping forfeitures of defendants' licensing rights apply in any industry in which they may engage throughout their entire existence—metals, plastics, construction, etc.

Moreover, they prohibit these defendants, absolutely, from using business methods which are not illegal *per se* and which have repeatedly been approved by this Court. (See Point III, *supra.*) We have previously mentioned that the President's National Patent Planning Commission, in its report of June 18, 1943, has come out strongly against prohibiting such licensing (See p. 9 of the Report), and that Congress has repeatedly refused to amend the anti-trust laws to forbid such licensing.

We submit that the proper rule is that laid down in *Salt Producers Ass'n* v. *Federal Trade Commission,* 134 F. (2d) 354 (C. C. A. 7th), namely that in prohibiting conduct:

> "• • • it must be clear that such enforcement order does not invade any legal rights which are theirs, when separated from the illegal conspiracy • • •" (p. 360).

Patent Office procedure is revised.

The District Court has also undertaken in its judgment to revise drastically the patent statutes and the Patent Office rules of procedure which have the force of statutes—in so far as applicable to these defendants (Judgment, §§51-54, R. X, 7686-90). This revision is so vague and uncertain in meaning that it is completely unworkable—and will create interminable difficulties when applied as a precedent in other cases.

Section 52 (a), relating to the filing of patent applications, condemns any such application by a defendant for the purpose "in part" of "hindering" the "use or development or improvement" of a machine or process which obtains results similar to one owned by the applicant (Judgment, §52 (a), R. X, 7687). The effect of this is that from now on few patent applications can safely be made. An inventor in making an application always has the motive of prevent-

ing the unlicensed use of his inventions by others, including its unlicensed use on any similar or competitive machines whose "use or improvement" might to some extent be "hindered" without such invention. It should be realized that no inventor can ever "hinder" except by inventing something new. A court should hesitate long before discouraging invention, for whatever purpose.

Section 52 (b),* also relating to the filing of patent applications, in effect permits a defendant to apply for a patent on his invention only if he is sure to use it within four years (Judgment, §52 (b), R. X, 7687). If he does not use his invention within four years he is presumed to have intended suppression of his invention—and unless he proves that his mental state was otherwise he is punishable by contempt. This is a particularly unrealistic provision. Anyone ahead of his time must wait for other inventions to be made or for engineering problems to be solved—or for demand to be created—before he can put his invention to commercial use. Inventors invent first, obtain patents upon their discovery next, and then look about for some commercial use for their discovery. In other words, "pure" research is discouraged by the judgment. The inventor must not only make a new discovery but he must know exactly what it will do and how cheaply it can be marketed and whether and how soon it can be marketed before he can safely apply for a patent.

Section 53 (a) enjoins each defendant from agreeing with any other person to take out glassware or glassware machine patents for the only purpose for which any inventor would take patents out—*i. e.*, for the purpose of obtaining "patent control" of such glassware or glassware machinery (Judgment, §53 (a), R. X, 7688).

---

* Possibly subsections (a) and (b) of Section 52 are to be read together. This, however, is far from clear.

Section 53 (d) contains bewildering language which appears to forbid the transfer of interference claims by negotiation between a defendant and any other person, regardless of the reasonableness of the transfer and the fairness of the negotiation (Judgment, §53 (d), R. X, 7688-9). In effect—Hartford and the other defendants are thereby required to fight every interference to the bitter end, regardless of the merits involved, instead of settling the dispute by compromise.

Section 53 (e) possibly has the effect of causing each defendant to sterilize his research from that of any other person, for he must not agree with another person to exchange unpatented ideas except under license or "in the regular course of business"—whatever that means (Judgment, §53 (e), R. X, 7689). If this section is interpreted broadly—and the exceptions narrowly—it will inevitably result in wasteful duplication of research—inventors being discouraged from utilizing the research of others as a point of departure for further research.

Section 53 (f) prohibits securing information concerning interferences or unpatented inventions of others, except under certain narrow conditions—however innocent the purpose of the inquiring party may be (Judgment, §53 (f), R. X, 7689).

The proviso clause of Section 53 apparently prevents even the same patent lawyer from representing two inventors if the inventors are defendants (Judgment, §53, R. X, 7689).

Section 54 prevents any agreement between any of the defendants with respect to Patent Office interference procedure, if the purpose is to "delay" any other applicant (Judgment, §54, R. X, 7689-90). This would seem to mean that no agreements of any nature with respect to the

declaration or prosecution of interferences are permitted, however reasonable, because every interference delays other applicants.

The changes in patent law and Patent Office procedure brought about by the above illustrative provisions are both bewildering and staggering. Entirely new requirements and restrictions are written into the patent laws; and Patent Office procedure is completely revised.

Previous to this case the principle had been well recognized that neither the executive department nor the courts could engraft new conditions upon existing patent law and patent procedure.

As this Court stated in *United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, with respect to the attempt of the executive department to engraft new conditions upon patent rights:

> "The grant of letters patent is not, as in England, a matter of grace or favor, so that conditions may be annexed at the pleasure of the executive. To the laws passed by the Congress, and to them alone, may we look for guidance as to the extent and the limitations of the respective rights of the inventor and the public" (p. 189).

The courts themselves, under the ruling in *Chapman* v. *Wintroath*, 252 U. S. 126, are powerless to make such changes in patent rights and Patent Office procedures. With reference to a patent attacked in that case, this Court stated:

> "• • • their [applicants'] rights may not be denied or diminished on the ground that such delay may have been prejudicial to either public or private interests. 'A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single

one. These are questions not of natural but of purely statutory right * * *'" (pp. 136-7).

Other provisions.

There are many further prohibitions of legitimate business activities in the judgment below. We can mention but a few—

The acquisition or holding by one defendant of stocks, bonds or other evidences of indebtedness of another company in the glass machinery or glassware business has been prohibited—even where entirely reasonable and having no effect whatever upon competition (Judgment, §§33 and 36, R. X, 7674-5, 7677-8). This in effect would prevent the holding by one company of stock in another company with which it was in no degree whatever in competition. It would prevent a company from taking a note—as distinguished from cash—for goods sold and delivered to another company not in competition with it. It would prevent the individual defendants from owning any stock in innumerable companies which may to some extent manufacture some article of glassware. It would even prevent Hartford from going into the glass manufacturing business—if this decree confiscates its machinery business—through acquisition of the stock or assets of an existing manufacturer.

Again, trade association activities are so unrealistically curtailed as to be rendered futile (Judgment, §40, R. X, 7680-2). Hartford has never been an active member of the industry association and so no extended discussion of this provision will be made in this brief. That will be left to the brief submitted on behalf of the defendant Association. Since this is a test case, however, Hartford does wish to point out that the judgment below profoundly modifies pre-existing conceptions of the proper function of trade associations. It would be most unfortunate for this judgment to stand as a future precedent to that effect.

Moreover, since the trade association provisions of the judgment are expressed in terms so broad as to include all kinds of cooperative collection of data, we also wish to point out that it would have the serious effect of preventing Hartford from carrying on those cooperative studies in machine efficiency which have been so enormously helpful to its smaller licensees. It would probably even prevent Hartford from becoming a member of a credit association (See particularly Judgment, §40 (1) (d) and (e), R. X, 7680-1).

Finally, the numerous prohibitions of the judgment relating to price and other competitive activities—hereinabove discussed—fail to except from such prohibitions the cooperative action authorized by statutes such as the following:

Emergency Price Control Act (50 U. S. C. App. §905);
Small Business Mobilization Act (50 U. S. C. App. §1112);
Miller-Tydings Act (15 U. S. C. §1);*
Webb-Pomerene Act (15 U. S. C. §62).

The court below was urged to state in the judgment that nothing therein prevents action authorized by any of these Acts—but without success. This was a particularly important request because, as part of the war program, certain cooperative industry agreements—including agreements as to price—are specifically authorized by the first named Acts. Any such agreements are now prohibited under this judgment, along with resale price maintenance authorized by the Miller-Tydings Act* and trade agreements authorized by the Webb-Pomerene Act.

---

* Section 40 of the judgment alone recognizes the existence of these statutes and then only excepts—from the provisions of that Section—conduct of the corporate defendants pursuant to the Miller-Tydings Act.

In summary, the District Court by the instant judgment has provided additional penalties and prohibitions of sweeping and unprecedented scope. We submit that the ruling of this Court in *Republic Steel Corporation* v. *National Labor Relations Board,* 311 U. S. 7, is as applicable to the Department of Justice and the court below in the instant case as it was to the Board in the *Republic Steel* case—namely that:

> "We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act" (p. 11).

Perpetual Surveillance.

In conclusion, the judgment contains numerous provisions requiring each of the defendants, throughout their corporate and individual lives, to be followed by perpetual surveillance, both on the part of the District Court and of the Department of Justice.

The judgment, as we have seen, not only provided that the defendants should operate under public utility obligations—but also reserved to itself in numerous ways the supervision of such public utility operation.

Indeed the judgment went further and provided that *every* agreement between any of the defendants—individual or corporate—must in perpetuity be subject to the approval of the court. This latter provision reads as follows:

> "31. The form of any agreement between any of the defendants and of any license agreement made pursuant to this judgment and to which any of the defendants is a party, shall be subject to approval of this Court, on petition by any defendant proposing

> to enter into such an agreement, on ten (10) days' notice to the Attorney General; provided, however, that it shall be unnecessary to obtain the approval of the Court as to the form of any agreement which is identical (except as to parties, dates, number, and types of machines involved) with any form theretofore approved by the Court'' (Judgment, §31, R. X, 7673-4).

The foregoing requirement is so extreme that one of the corporate defendants could not even enter into a contract of employment with one of its own officers—or change the form of his employment contract—without approval of the court. An individual defendant could not make any purchase, however insignificant, from a corporate defendant, without approval of the court. An individual defendant could not purchase a house from another individual defendant—without approval of the court. A corporate defendant could not purchase raw material from any corporate defendant without approval of the court.

The exception to this requirement of court approval—permitting the execution of contracts identical to others previously approved—is illusory, because contracts are practically never identical.

In each of these cases the defendant must give the Attorney General 10 days' notice, appear in court, argue in defense of the proposed arrangement, and if possible secure the court's approval.

Appeal from each and every one of these proceedings would be direct to this Court.

It is one of the fundamental principles of equity that the courts should avoid where possible the direct management and operation of business. But as a result of this judgment the District Court—and thus this Court—will to a

large extent be charged with deciding the ordinary business problems of this entire industry.

Moreover, the judgment provides that for the purpose of securing compliance with its provisions the corporate defendants are to be subject:

1. To the examination of all their books and papers by the Department of Justice—in perpetuity;
2. To the interviewing of their officers and employees by the Department of Justice—in perpetuity;
3. To the requirement that they must submit reports to the Department of Justice—in perpetuity (Judgment, §55, R. X, 7690-1).

Accordingly—subject only to "legally recognized privilege"—the Department of Justice in the guise of seeing whether the judgment is being carried out may in perpetuity ransack every paper in the possession of any of these corporate defendants—in complete disregard of the constitutional prohibition against unreasonable searches and seizures.

It is not claimed that a District Court should not be able in a proper case to require defendants to submit reports reasonably contemporaneous with the judgment to assure the court that its requirements have been carried out. But a requirement for perpetual espionage—of this unlimited scope—should not be imposed upon any person. There should at least be some limit as to the time within which he is to be subjected to disabilities which are not the common duty of all persons.

This Court in the following two, among many other, cases has condemned in the strongest language any such unrestricted right of investigation into the affairs of a private corporation—whether guilty or innocent of an alleged infraction of the law.

Go-Bart Importing Co. v. *United States,* 282 U. S. 344 (1931):

> "• • • [The Fourth Amendment to the Constitution] is general and forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent • • • Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty • • • The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted. *Boyd* v. *United States,* 116 U. S. 616, 623. *Weeks* v. *United States, supra,* 389-92" (pp. 356-7).

Federal Trade Commission v. *American Tobacco Company,* 264 U. S. 298:

> "The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public • • • nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance • • • would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up" (pp. 305-6).

Conclusion.

It is respectfully submitted, in conclusion, that the judgment in this case should be reversed.

The holdings that the Hartford settlement agreements were illegal—that its non-exclusive licenses should be set

aside—that its limited licenses were illegal—should not be allowed to stand. Indeed, as a precedent, they would strait-jacket progress in this technical age.

The judgment provisions ordering the forfeiture of patents — compulsory licensing — and the prohibition of limited licenses—puts into effect, by judicial legislation, changes in the patent and anti-trust laws which Congress has repeatedly rejected during the past fifty years. The judgment thereby clearly conflicts with the ruling of *United States* v. *Cooper Corporation,* 312 U. S. 600, in which this Court emphasized that:

> "The recent expressions of this court in *Tigner* v. *Texas,* 310 U. S. 141, 148, 149, warn that it is not for the courts to indulge in the business of policy-making in the field of anti-trust legislation" (p. 606).

Even if the Court should find that in any respect the defendants have gone too far (which we urge is not the case), the relief accorded below clearly is excessive, inappropriate and should be set aside. In any such event this Court should nevertheless find:

1. That the principles upon which the judgment is based are unsound and should be disapproved.
2. That these principles are so interwoven throughout the judgment and so permeate all of its provisions that it is impossible in this appellate proceeding to cure these defects by minor limitations or changes.
3. That these provisions, as a whole, should be set aside and the case remanded to the court below with instructions to enter a new judgment in conformity with the opinion of this Court.
4. That any new judgment should avoid the confiscation of patents, machinery or income; the prohibi-

tion of acts not illegal *per se*, including the right to lease machinery, except when used as part of an illegal combination; the imposition of public utility obligations; the prohibition of acts beyond the issues of the case; and any requirements for the continuing operation of the businesses of the defendants subject to the perpetual supervision of the court and the surveillance of the Department of Justice.

5. That in connection with any new judgment the defendants should be permitted to offer a plan of relief and to be heard at such proceedings as may be appropriate thereto.

We respectfully submit, however, that for the reasons herein set forth, the judgment below as a whole should be reversed.

Respectfully submitted,

JOHN T. CAHILL,
Attorney for Hartford-Empire Company, and the individual defendants associated therewith.

THURLOW M. GORDON,
STUART S. WALL,
JERROLD G. VAN CISE,
JAMES M. CARLISLE,
Of Counsel.

(Appendix)

Statutes Involved.

(1) The Sherman Act of July 2, 1890, Sections 1, 2 and 4 (Act of July 2, 1890, c. 647, Secs. 1, 2 and 4, 26 Stat. 209, as amended by 36 Stat. 1167 and 50 Stat. 693, 15 U. S. C. Secs. 1, 2 and 4):

> "[Section 1.] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *. Every person who shall make any such contract or engage in any such combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."
>
> "Sec. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."
>
> "Sec. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute pro-

ceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

(2) The Clayton Act of October 15, 1914, Sections 3 and 15 (Act of October 15, 1914, c. 323, Secs. 3 and 15, 38 Stat. 731 and 736, 15 U. S. C. Secs. 14 and 25):

"Sec. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

"Sec. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it

shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof."

Exhibits Involved

Exhibit Number	Offered in Evidence	Admitted in Evidence	Printed in Record	Cited Herein
1	I 642	I 736	XII 8598	26, 27
3	I 658	I 658	XVIII 12368A	27
5	I 658	I 658	XVIII 12369	27
7	I 666	I 666	XVIII 12371	29, 30
16	I 695	I 696	XVII 11943	30
19	I 697	I 698	XII 8606A	30, 31
52	II 806	II 806	XVIII 12523	34
55	II 810	II 810	XII 8629	33, 34, 63
58	II 817	II 817	XVIII 12535	37
61	II 820	II 820	XII 8665	38
74	II 834	II 835	XVIII 12565	37
80	II 843	II 844	XVIII 12579	38
82	II 864	II 869	XII 8717	38
111	II 848	II 848	XVIII 12597	43
114	II 853	II 853	XVIII 12599	35
119	II 856	II 856	XVIII 12620	35
121	II 859	II 859	XIX 12631	35
142	II 915	II 917	XII 8764	39, 41, 42, 60, 142
144	II 915	II 917	XII 8783	34
145	II 915	II 917	XII 8787	34, 60, 63
152	II 930	II 930	XII 8839	38
198	II 998	II 998	XII 8876	60
199	II 999	II 999	XII 8877	60
231	II 1032	II 1032	XII 8907	58
237	II 1039	II 1039	XII 8929	58
240	II 1042	II 1043	XII 8931	58
263	II 1076	II 1076	XII 8972	48
265	II 1077	II 1077	XII 8995	48
292	II 1134	II 1134	XIX 12833	45
307	II 1143	II 1144	XII 9056	45
329	II 1179	II 1179	XII 9065	44

Exhibit Number	Offered in Evidence	Admitted in Evidence	Printed in Record	Cited Herein
330	II 1182	II 1182	XII 9067	45, 47
336	II 1184	II 1184	XII 9083	46
337	II 1184	II 1184	XII 9087	46
340	II 1186	II 1186	XII 9091	47
395	II 1234	II 1235	XX 13001	55
411	II 1248	II 1248	XII 9102	35, 63, 120
565	II 1368	II 1369	XII 9103	44
566	II 1371	II 1371	XII 9108	44
568	II 1378	II 1380	XII 9109	34, 69
569	II 1379	II 1380	XII 9113	69
571	Folio 2676	II 1380	XII 9125	35
580	II 1387	II 1388	XIII 9213	51
648	II 1610	II 1610	XX 13311	48
910	IV 2347	IV 2347	XXI 13567	39
946	IV 2444	IV 2444	X 7931	101
947	IV 2444	IV 2444	XXI 13593	61
973	IV 2572	IV 2573	XI 7984	20, 21, 25, 32, 36, 39, 52, 53
1001	IV 2704	IV 2799	XXI 13662C	46
1002	IV 2704	IV 2799	XXI 13663	46
1003	IV 2704	IV 2799	XXI 13664	46
1004	IV 2704	Folio 4997	XXI 13665	46
1568	V 3838 VI 3941	VI 3941	XI 8037	9
1569	V 3861 VI 3941	VI 3941	Folio 15395 (omitted in printing)	101
1576	V 3861 VI 3941	VI 3941	XI 8043	101
1583	V 3840 VI 3941	VI 3941	XI 8095	30
1585	V 3861 VI 3941	VI 3941	XI 8133	54, 55
1608	VI 3941	VI 3941	XIII 9336	57
1618	VI 3941	VI 3941	XIII 9358	43

Exhibit Number	Offered in Evidence	Admitted in Evidence	Printed in Record	Cited Herein
1625	V 3848 VI 3941	VI 3941	XIII 9386	21, 32, 40, 54, 65
1636	VI 3941	VI 3941	XIII 9450	43
1651a	VIII 6260	VIII 6260	XXII 14071	48
1655	VI 3941	VI 3942	XXII 14078	41
1778	VI 4130	VI 4130	XXII 14266	40, 41, 42
1824C	VII 5455	VII 5455	XXIII 14354C	54, 66
1852	VI 4250	VI 4250	XXIII 14380	27
1866	VI 4635	VI 4635	XIII 9512B	28
1904	VII 5277	VII 5277	XXIII 14441	38
H-5001	Folio 2725	II 1404	XXIV 14675	12, 16, 17, 22
H-5002	II 1425 VI 4543	II 1426 VI 4544	XII 8506	20, 28, 55, 58, 67, 144
H-5006	II 1440	II 1440	XXIV 14694	32, 37, 52
H-5007	II 1444	II 1444	XXIV 14701	38
H-5008	II 1446	II 1446	XXIV 14702	19
H-5009	II 1446	II 1446	XXIV 14707	19
H-5010	II 1446	II 1446	XXIV 14709	19, 37, 38
H-5011	II 1453	II 1453	XXIV 14711	22, 55, 67
H-5021	II 1467	II 1467	XXIV 14723	74
H-5025	II 1472	II 1472	XXIV 14731	126
H-5026	II 1475	II 1475	XIII 9527	61, 71
H-5027	II 1475	II 1475	XIII 9532	123
H-5028	II 1475	II 1475	XIII 9538	44
H-5030	II 1477	II 1477	XIII 9540	31, 57, 71
H-5031	II 1477	II 1479	XIII 9542	31
H-5032	II 1479	II 1479	XIII 9544	58
H-5033	II 1479	II 1479	XIII 9547	58
H-5070	III 1894	III 1895	XXIV 14754	50
HA-5073	IV 2512	IV 2512	XXIV 14758	39
H-5101	IV 2868	IV 2868	XIV 9901	46
O-5208	V 3755	V 3755	XVIII 12328	12, 23
H-5228	V 3819	V 3819	XV 11168	19
H-5248	V 3836	V 3862	XIV 10323	36

Exhibit Number	Offered in Evidence	Admitted in Evidence	Printed in Record	Cited Herein
H-5249	V 3836	V 3862	XIV 10401	14, 36
H-5284	V 3865	V 3865	XIV 10437	36
H-5321	VI 4072	VI 4072	XIII 9619	50
H-5342	VI 4319	VI 4319	XXV 15032C	14, 16
H-5345	VI 4329	VI 4329	XXV 15033	36
H-5346	VI 4334	VI 4334	XXV 15034	56
H-5347	VI 4336	VI 4336	XXV 15041	53, 56
H-5349	VI 4362	VI 4362	XXV 15050B	27
H-5355A	VI 4457	VI 4457	XVII 11997	16
H-5355B	VI 4457	VI 4457	XVIII 12027	16
H-5357	VI 4494	VI 4494	XXV 15059	49
H-5360	IX 6668	IX 6668	XXV 15060	24, 36
H-5361	VI 4541	VI 4541	XXV 15061	18
H-5395	VII 4871	VII 4871	XIII 9626	30
H-5398	VII 4881	VII 4881	XXV 15095	19, 20, 21 39
H-5410	VII 4896	VII 4896	XXV 15132	37
H-5481	VII 5035	VII 5035	XXVI 15233	37
H-5499	VII 5061	VII 5061	XXVI 15255	36
H-5502	VII 5062	VII 5062	XXVI 15256	45
H-5504	VII 5064	VII 5064	XIII 9632	38
H-5523	VII 5085	VII 5085	XXVI 15273	46
H-5551	VII 5129	VII 5129	XXVI 15303	32
C-5662	VII 5536	VII 5536	XXVI 15367	30
H-5680	VIII 5637	VIII 5637	XVIII 12028	16
H-5691	VIII 5686	VIII 5686	Folio 23826 (omitted in printing)	47
H-5749	VIII 5732	VIII 5733	XXVII 15435	38
H-5750	VIII 5733	VIII 5733	XXVII 15436	2, 56, 57, 58, 59, 62
H-5782	VIII 5983	VIII 5983	XIII 9655	54
H-5799	VIII 5809	VIII 5809	XXVII 15451	54, 66
H-5803	VIII 5838	VIII 5838	XXVII 15455	55
H-5803A	IX 6809	IX 6809	XXVII 15456	55

Exhibit Number	Offered in Evidence	Admitted in Evidence	Printed in Record	Cited Herein
H-5823	VIII 5884	VIII 5884	XXVII 15475	9
H-5825	VIII 5887	VIII 5887	XXVII 15477	64, 66
H-5826	VIII 5887	VIII 5887	XXVII 15478	64
H-5851	VIII 5991	VIII 5991	XXVII 15507	37
H-5875	VIII 6054	VIII 6055	XXVII 15523	37
H-5882	VIII 6067	VIII 6067	XXVII 15543	45, 46
H-5887	VIII 6083	VIII 6083	XXVII 15552	45, 46
H-5906	VIII 6102	VIII 6102	XXVII 15602A	43
H-5910	VIII 6103	VIII 6103	XXVII 15603	43
H-5915	VIII 6121	VIII 6121	XIV 10901	18
H-5918	VIII 6132	VIII 6132	XIV 10956	49
O-5945	VIII 6240	VIII 6241	XXVII 15615	9, 10, 11
O-5946	VIII 6241	VIII 6242	XXVII 15618	10
O-5947	VIII 6243	VIII 6243	XXVII 15634	10
O-5948	VIII 6244	VIII 6244	XIII 9709	12
H-5950	VIII 6281	VIII 6282	XXVII 15654	45
O-5958	VIII 6268	VIII 6268	XXVII 16009	13
O-5995	IX 6371	IX 6371	XIII 9721	12
O-5996	IX 6371	IX 6371	XIII 9738	12
O-5997	IX 6372	IX 6372	XIII 9755	12
O-6000	IX 6380	IX 6380	XXVIII 16068	41
O-6006	IX 6390	IX 6391	XXVIII 16079	12
O-6012	IX 6391	IX 6391	XXVIII 16116	63
O-6014	IX 6391	IX 6391	XXVIII 16132	12, 20
O-6028	IX 6402	IX 6403	XXVIII 16153	39
O-6030	IX 6403	Folio 11382	XXVIII 16158	32, 39
H-6052	IX 6446	IX 6446	XXVIII 16171	45
O-6057	IX 6456	IX 6457	XXVIII 16178	24, 31
GCA-6082	IX 6623	IX 6623	XXVIII 16242A	62, 66
GCA-6083	IX 6623	IX 6623	XXVIII 16243	62, 66
GCA-6084	IX 6624	IX 6624	XXVIII 16244	65, 67
GCA-6085	IX 6624	IX 6624	XXVIII 16245	64, 65, 67
GCA-6086	IX 6624	IX 6624	XXVIII 16246	64, 65, 67
GCA-6088	IX 6624	IX 6624	XXVIII 16248	64

Exhibit Number	Offered in Evidence	Admitted in Evidence	Printed in Record	Cited Herein
GCA-6090	IX 6625	IX 6625	XXVIII 16250	12, 35, 42, 64
GCA-6091	IX 6626	IX 6626	XXVIII 16251	66
GCA-6092	IX 6626	IX 6626	XXVIII 16252	66
H-6113	IX 6694	IX 6695	XXVIII 16256	69
H-6152	IX 6737	IX 6737	XII 8571	2, 9, 15, 17, 53, 56, 65, 66, 67, 141
H-6153	IX 6738	IX 6738	XXVIII 16278	32
O-6183	IX 6752	IX 6753	XV 11100	13